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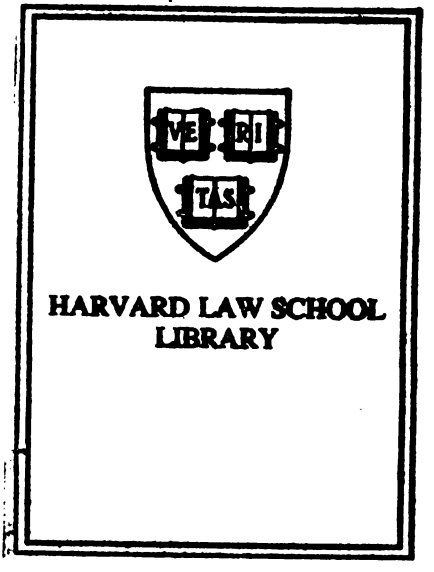

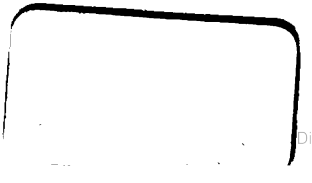

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MICHIGAN REPORTS.

REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF MICHIGAN,

FROM

APRIL 10, 1873, TO JULY 25, 1873.

HOYT POST, STATE REPORTER.

VOLUME V.,
BEING VOLUME XXVII. OF THE SERIES.

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SUPREME COURT OF MICHIGAN.

ISAAC P. CHRISTIANCY, Chief Justice.
BENJAMIN F. GRAVES, }
THOMAS M. COOLEY, } Associate Justices.
JAMES V. CAMPBELL, }
BYRON D. BALL, Attorney General.

CIRCUIT JUDGES.

FIRST CIRCUIT,
DANIEL L. PRATT.

SECOND CIRCUIT,
HENRY H. COOLIDGE.

THIRD CIRCUIT,
JARED PATCHIN.

FOURTH CIRCUIT,
ALEXANDER D. CRANE.

FIFTH CIRCUIT,
GEORGE WOODRUFF.

SIXTH CIRCUIT,
JAMES S. DEWEY.

SEVENTH CIRCUIT,
JOSIAH TURNER.

EIGHTH CIRCUIT,
LOUIS S. LOVELL.

NINTH CIRCUIT,
CHARLES R. BROWN.

TENTH CIRCUIT.
JOHN MOORE.

ELEVENTH CIRCUIT,
DANIEL GOODWIN.

TWELFTH CIRCUIT,
JAMES O'GRADY.

THIRTEENTH CIRCUIT,
JONATHAN G. RAMSDELL.

FOURTEENTH CIRCUIT,
AUGUSTINE H. GIDDINGS.

FIFTEENTH CIRCUIT,
RICHARD W. MELENDY.

SIXTEENTH CIRCUIT,
EDWARD W. HARRIS.

SEVENTEENTH CIRCUIT,
BIRNEY HOYT.

EIGHTEENTH CIRCUIT,
SANFORD M. GREEN.

NINETEENTH CIRCUIT,
SHUBAEL F. WHITE.

TWENTIETH CIRCUIT,
JOHN W. STONE.

JUDGE OF THE SUPERIOR COURT OF DETROIT,
LYMAN COCHRANE.

RECORDER OF THE CITY OF DETROIT,
GEORGE S. SWIFT.

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AMENDMENT OF SUPREME COURT RULE No. 57.

ORDERED JANUARY 6, 1874, TO READ AS FOLLOWS:

RULE 57. The evening of the second Thursday in each term is designated for the examination of applicants for admission to the bar, and no examinations will occur at other times. Every applicant will apply by petition, addressed to the court, and verified by his oath, and stating that he is of the age of twenty-one years and a resident citizen of this state. The certificate of at least one reputable member of the bar, or other reputable person known to the court, and satisfactorily certifying to the good moral character of the applicant, must be annexed to the petition; and these papers are required to be filed with the clerk at some time in the term not later than the opening of the afternoon session on examination day. On admission the applicant will take the usual oath of office, sign the roll of attorneys kept by the clerk, and pay to that officer the fee of two dollars, and thereupon a certificate in testimony of such examination and admission will, upon demand thereof, be prepared in due form by the clerk and issued under the seal of the court and the hand of the chief justice or presiding justice.

Any person who shall have been duly licensed as an attorney and counselor at law and solicitor and counselor in chancery, by any circuit court in this state, may, on application to the clerk, and the exhibition of such license, under the seal of the circuit court which granted it, be permitted to sign his name on the roll of attorneys in this court.

ADDITIONAL SUPREME COURT RULE.

ADOPTED JULY 22, 1874, AS FOLLOWS:

RULE 58. Statements of all motions which are not calendar cases must be left with the clerk at some time before the day they are intended to be brought on. Every such statement must contain the title of the motion, the nature or grounds of it in brief form, and the name of the moving counsel, and also of the opposing counsel, if known. The clerk will enter such statements on a motion docket, to be by him provided for the purpose, and in the order in which they are delivered to him, and will, on the opening of the court on motion day, present the docket to the court. Motions within this rule will be called from the motion docket for argument in their order; and no motions, except such as are calendar cases, will be entertained, unless brought forward as provided by this rule.

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APRIL TERM, 1873, AT DETROIT.

(CONTINUED FROM VOLUME XXVI.)

In the matter of Mary Eaton.

Habeas corpus. A writ of *habeas corpus* will not be granted to review a final judgment in an ordinary criminal cause, for errors which are properly reviewable by writ of error, and where that writ is an adequate remedy.

Heard April 9. Decided April 10.

Application for *habeas corpus.*

F. A. Baker, for petitioner.

PER CURIAM.

The prisoner is in confinement in the house of correction, under sentence for larceny from the person. Petition was presented for a writ of *habeas corpus,* to test the sufficiency of the information on which she was convicted. The court held that this would be to make the writ of *habeas corpus* take the place of a writ of error, which was not an allowable use of the process, and consequently they denied the prayer of the petition.

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Louis Mendelsohn v. Mortimer L. Smith.

Certiorari: Attachment: Replevin. *Certiorari* will not lie to review proceedings of a circuit court commissioner in dissolving an attachment, to try the title to the goods attached, upon a claim of the plaintiff in attachment that the goods are his own. An attachment is not the proper process to obtain possession of goods which the plaintiff claims are his property; his remedy is replevin.

Heard April 9. Decided April 10.

Application for *certiorari.*

The petitioner had sued out a writ of attachment and attached certain pictures. The defendant moved for its dissolution before a circuit court commissioner, and it was dissolved. On the hearing before the commissioner the question was raised, who owned the property attached. The plaintiff in attachment claimed the property as his own, and in the petition for a *certiorari* he insists that he owns it.

William E. Cheever, for the petitioner.

THE COURT held that if the property was the petitioner's, an attachment was not the proper process to obtain it by; and whether the attachment was properly dissolved or not, was therefore immaterial to his rights, and could not preclude his testing them in replevin.

Writ denied.

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Fractional School District No. 1, of Owosso, etc. v. The Joint Board of School Inspectors of Owosso, Sciota, Bennington and Middlebury.

Certiorari: School district: Corporate existence: Quo warranto. A *certiorari* to review proceedings whereby a new school district has been created out of old districts, must be applied for before the district has been organized and assumed the functions of a corporation; after that time the proper course is, to take measures to try the legality of its corporate existence by *quo warranto*, or other direct proceedings against the alleged corporation or its officers.

Heard and decided April 10.

Certiorari to the Board of School Inspectors of Owosso, etc.

This writ was brought to reverse the action of town boards in creating a fractional school district out of old districts. The action was taken in November, 1871, and the *certiorari* was sued out in February, 1873.

Hugh McCurdy, for plaintiff in *certiorari.*

Gould & Lyon, for respondents.

THE COURT held that after the lapse of such a time it can fairly be presumed that the district has been organized in fact, officers elected, and expenses incurred. The court will not, at this late day, review the proceedings on *certiorari,* to which the district or its officers would not be parties; but if any one desires to contest the legality of the organization, he must proceed by *quo warranto* against the district or its officers.

Certiorari dismissed.

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Champion Eslow and another v. The Township of Albion and another.

Bill in equity: Hearing in open court: Judge at chambers: Jurisdiction. Where the defendants in a chancery cause have elected under the statute to have the case tried in open court, the circuit judge has no power at chambers to order the proofs to be taken before a commissioner.

Heard and decided April 10.

Appeal in Chancery from Calhoun Circuit.

After this case had been put at issue, the defendants, under the statute (*Sess. L. 1869, p. 381, § 57*), elected to have the case tried in open court. Complainants thereupon made a special application to the circuit judge at chambers, for an order that, instead of the trial in open court, testimony should be taken before a commissioner in the usual mode. Defendants objected to this order, and to the taking of testimony under it, but their objection was overruled, and the order granted. The case proceeded to final decree, and was then appealed.

Brown & Patterson and *C. I. Walker*, for complainants.

F. G. Holmes, Noyes & Porter, and *G. V. N. Lothrop*, for defendants.

THE COURT held that the judge had no power to make such an order at chambers; that the proofs taken were without authority, and must be stricken out; and that the decree must be set aside as premature, and the cause remanded for further proceedings.

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The People on the relation of Horace Turner v. The Judge of the Wayne Circuit Court.

Statute construed. Under the act establishing the superior court of Detroit, an application to transfer a cause from the Wayne circuit, made after the act has taken effect and the judge been elected, cannot be denied on the ground that the court has not been fully organized for the reason that the time fixed for holding its first term has not yet arrived.

Heard and decided April 12.

Application for *mandamus.*

The relator applied to the respondent in accordance with the law establishing the superior court of Detroit (*Sess. L., 1873, Vol. 1, p. 61*) to have a cause pending in the Wayne circuit court, to which the relator was a party, transferred to the superior court, presenting his bond and asking the respondent to approve the sureties. The respondent claiming that the superior court had not been organized yet, and that the action of the relator was premature, and that the law establishing the new court was unconstitutional, refused at the request of the counsel for the other parties to the suit, to pass upon the sureties or to approve the bond. The relator applies for a *mandamus.*

The main objection made on the argument on behalf of the respondent was that the superior court was not yet organized, and that there was consequently no court to which the cause could be transferred.

The statute was approved March 28, 1873, and took immediate effect. It provided for an election of a judge in April, 1873, whose term of office should commence on May 1, 1873. The first term of the court is to commence on the first Tuesday of June, 1873.

John J. Speed and *Ashley Pond,* for the relator.

H. M. Duffield and *S. Larned,* for the respondent.

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THE COURT held that, under the statute, the only effect of the filing of the bond was to stay proceedings until the first term thereafter of the superior court; and that the objection that the court is not now fully organized is untenable.

Writ granted.

Anson E. Chadwick and others v. Sally M. Broadwell and others.

Contract for manufacturing lumber: Lien for saw bill: Credit. The contract in this case for manufacturing lumber from logs was held to give a lien for the saw bill, notwithstanding a provision for the payment of the bill for sawing "as often as once a month after the lumber is delivered out of said mill." CAMPBELL, J. dissenting.

Lumber: Saw bill: Lien: Removal: Inspection: Possession. This lien was not lost by the removal of the lumber from the mill yard, some five miles, to a dock at the place of shipment; the provision of the contract that the quantity sawed should be determined by the sales or inspection bills at the place of shipment, is not inconsistent with the continuance of such lien; and such inchoate and conditional possession as might be taken by the purchaser at inspection proceeded would not cut off the lien.

Logs: Lumber: Lien for sawing: Bona fide purchaser. Parties who, in contracting for the sale of logs, have provided for the manufacture of the logs into lumber by their vendee, and thus permitted him to create a lien thereon for the sawing, in dealing with his assignees afterwards in respect to the lumber without any inquiries as to such lien, cannot claim the rights of *bona fide* purchasers through a mere formal transfer by word of mouth simply, and in consideration of a pre-existing debt for the purchase price of the logs.

Replevin: Saw bill: Lien: Measure of damages. Where the defendants in a replevin suit have established a lien for sawing, upon a quantity of lumber of which that replevied was only a portion, a ruling which permits the assessment of their damages at such a portion of their whole lien as the lumber replevied bore to the whole amount subject to the lien, is not one of which the plaintiffs can complain; such apportionment is even more liberal to the plaintiffs than the law requires.

Heard January 11. Decided April 15.

Error to Alpena Circuit.

A. E. Chadwick, in person, for plaintiffs in error.

McDonell & Cobb, for defendants in error.

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CHADWICK v. BROADWELL.

COOLEY, J.

The facts out of which the present controversy arises are in the main undisputed. On the 31st day of August, 1868, Anson E. Chadwick and Thomas S. Skinner, two of the four plaintiffs, as parties of the first part, entered into a written agreement with Charles Clewley, as party of the second part, by which (quoting from the contract), they "agree to sell to the said party of the second part all the merchantable white pine stumpage" on certain described land, "for the sum of three dollars per thousand feet, to be paid for as hereinafter stated. And the said party of the second part covenants and agrees to and with the said parties of the first part, that he will cut and put into the river during the coming winter, all the good merchantable white pine which will make good merchantable lumber; * * that he will keep a just and accurate scale of said logs, which shall always be open to inspection of the parties of the first part or their agent, and that he will pay to the said parties of the first part the just and full sum of three dollars per thousand feet on the first day of July next; that in case the parties of the first part shall feel aggrieved at the manner of cutting said pine, they may take disinterested judges of pine, and estimate what pine, if any, is wasted or left on the premises, and the logs cut and put in as aforesaid, and the lumber manufactured from the same shall be held as well for what is left on the premises as for that which is put in as aforesaid."

Chadwick and Skinner, it appears, were interested in the land on which the logs were to be cut, jointly with Calvin Ames and Lucius B. Wheeler, the other plaintiffs; and there was evidence from which the jury might conclude that the contract was executed by the parties of the first part thereto on behalf of all concerned, and that Ames and Wheeler afterwards practically adopted it and claimed rights jointly with Chadwick and Skinner under it. Clewley went on to cut the pine under the contract, and caused the logs to

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be rafted to the mill of defendant Sally M. Broadwell, to be manufactured into lumber. At some time before April 8, 1869, Clewley appears to have transferred to George S. Lester and Fulton Bundy his interest under the contract in these logs, and they made with Mrs. Broadwell, as party of the second part, a written agreement of that date by which they "agree to deliver into the boom of said Broadwell as soon as they can be run, about two million feet of saw logs, more or less; and it is hereby understood that the expenses incurred in sorting the logs into said boom shall be paid by said second party. The said party of the second part agrees to take said logs and manufacture them into lumber, in a good workmanlike manner, with economy and prudence, and under the direction of the parties of the first part, as regards the kind of lumber to be made, one half of said lumber into strips if the parties of the first part may require it, and to take care to make all the upper qualities that is possible, and to assort and keep the upper qualities separate from the common; and for all of which the said second party shall receive the sum of four dollars and fifty cents per thousand feet; and it is understood that said four dollars and fifty cents includes all railroad charges. The quantity of the lumber is to be determined by the sales or inspection bills at the place of shipment. It is understood and agreed by the parties to this contract, that the party of the second part is to commence sawing said mentioned logs as soon as they are delivered as above specified, and to continue to saw on said saw-logs as fast as the capacity of said mill will permit; and to run night and day until they are all manufactured into lumber; and the parties of the first part agree to pay to the party of the second part, the amount of said bill as often as once a month after the lumber is delivered out of said mill."

The stumpage was not paid according to the contract made with Chadwick and Skinner, and there was owing therefor in the winter of 1870 some three thousand eight hundred or three thousand nine hundred dollars. Neither was the bill

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for sawing paid; and there was owing upon that three thousand two hundred dollars. The lumber as it was cut was put upon cars and taken from the mill to the Trowbridge dock, five miles distant, over a track, some sixty rods of which belonged to Mrs. Broadwell, and the remainder to Trowbridge. The railroad charges were one dollar per thousand feet, which either wholly or in part were paid by Lester and Bundy and charged to Mrs. Broadwell. The track ran into the mill yard, and there was testimony to the effect that the only means by which the lumber sawed could be carried from the mill in order to keep the mill clear, was the taking it off as was done. Both Mrs. Broadwell and her husband testified that they complained of the non-payment of the saw bill, and that it was agreed between them and Lester and Bundy that this removal of the lumber should not deprive her of a lien,—as Mr. Broadwell says, "that the lumber should be held on the dock, and the lien should continue on the dock, and that the lumber should not be shipped until we were paid or had satisfactory drafts for the saw bill;" or as Mrs. Broadwell says: "He (Bundy) told me I should have the lumber until the saw bill was paid. He said it would made no difference about the lumber being on the dock or in the yard;" or as Bundy says: "Mr. Lester and I consented that defendants' lien should continue on the dock the same as before." This was in July or August, 1869, and though not otherwise important, tends to show that any lien the law would give was not designed to be waived.

In the winter following this arrangement, Lester and Bundy, as plaintiffs claim, turned out to Ames and Wheeler for them about four hundred thousand feet of the lumber on the dock in payment of the balance due for stumpage. Bundy says: "I made a formal delivery to Ames and Wheeler on the dock." This delivery, however, it is evident was merely nominal, as the piles were in no way disturbed. In May, 1870, Chadwick, on behalf of the plaintiffs, went up with a scow to take away the lumber thus

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turned out, but found Broadwell there, who refused to permit it, claiming to have a lien for the saw bill. Chadwick testifies: "I told Broadwell in May or June, 1869, we owned the logs and should hold them under lien or conditional sale. Think none were sawed then. In October, 1869, I told him I had stopped any further shipment of lumber; lumber all sawed at this time, I think." "In the fall (of 1869) I advised him to proceed under the statute to secure or collect his saw bill out of the lumber."

Broadwell having thus refused to permit Chadwick to take away the lumber, the plaintiffs brought replevin. In the circuit court verdict and judgment have been rendered against them and the case is now before us on writ of error.

Numerous exceptions were taken to the rulings of the circuit court, but those relied upon here present but few points. That court held that Mrs. Broadwell, under the contract, had a lien on the lumber sawed for the saw bill. Plaintiffs, on the other hand, insist that the contract is inconsistent with an intent to retain such a lien. The reason they assign for this conclusion is, that by the contract the quantity sawed is "to be determined by the sales or inspection bills at the place of shipment," "which means that there was to have been no other measurement or place of measurement than the shipping measurement; and this measurement was the act of delivering to purchasers on board their vessels. The lien claimed would have been a fraud on purchasers."

We do not very clearly perceive that the determination of quantity by the inspection bills when sales were made would be inconsistent with the continued existence of the lien until payment was made. On the contrary, there would seem to be some good reasons for fixing upon this time and place for the purpose, even though it were understood that the lien was to be satisfied before the purchaser should acquire title. It would obviate the necessity which, in case of a purchase, would otherwise exist for two inspec-

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tions,—one to determine the sum to be paid for sawing, the other to ascertain the quantity delivered to a purchaser. But whether one inspection or two were had would be immaterial as regards the right of the mill man to payment for his work, or of the owner to the consideration to be paid on a sale. The inspection alone would not cut off the lien of the one, or the title of the other; neither would such possession as might be taken by the purchaser as inspection proceeded, have that effect, in the absence of any explicit understanding on the subject. Any such possession must be regarded as inchoate and conditional until payment should be made, and as only one of several steps in a transaction which the payment would complete. It is true that if the mill-man should stand by and allow the lumber to be sold, delivered, and paid for without asserting his lien, he might be estopped from asserting it afterwards; but this contract evidently contemplates a transaction to which there are or may be three parties, and if all participate, the purchaser is necessarily apprised of the lien, and is not wronged by its being insisted upon.

The provision in the contract that the amount of the bill for sawing shall be paid "as often as once a month after the lumber is delivered out of said mill," is not inconsistent with this view. We think whenever a sale was made, the defendant would be entitled to payment for sawing that amount, before the lumber could be taken from her possession; but she was entitled to monthly payments on inspections to be made at the place of shipment, whether sales were actually made or not.

We also think the circuit judge was right in holding that Mrs. Broadwell did not lose her lien by suffering the lumber to be placed on the Trowbridge dock. Under the agreement between Lester and Bundy and herself, the possession remained in her as much after it was transported to the dock as it did before. If she allowed sales and deliveries to be made to purchasers who were ignorant of her rights, the lien would thereby be waived to the extent of such sales, but not further.

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But the plaintiffs claim that they were *bona fide* purchasers, and as such were put in possession before they knew of any claim of lien. To this it may be replied that the whole transaction as between them and Lester and Bundy was by word of mouth only; no actual possession was taken by plaintiffs, and the attempt at a formal transfer of possession was ineffectual, because not made by the party in whom the possession vested. Mrs. Broadwell, in respect to the transaction, has been guilty of neither fraud, deception or negligence; the plaintiffs have paid nothing in consequence of it; and if their purchase fails by reason of her insisting upon her legal rights, their debt against Lester and Bundy remains as before. And in this view we think it immaterial whether or not the plaintiffs at the time they agreed to take the lumber in satisfaction of their claim had actual notice that Mrs. Broadwell insisted upon a lien, as defendants claim it is proved by Chadwick's testimony that they did. The nature of their own contract with Clewley was such as to permit him to have the logs manufactured, and consequently to create a lien thereon for the labor; and if they dealt with his assignees afterwards in respect to the lumber, they were bound at their peril to ascertain, either that the lien had been satisfied or waived, or, on the other hand, that the assignees had such possession of the lumber as to warrant the inference that no lien then existed.

The plaintiffs also object to the rule of damages laid down by the circuit judge for the guidance of the jury. The lumber replevied, it appears, was only a portion of that which remained upon the dock, and upon which Mrs. Broadwell retained a lien. The judge instructed the jury if they found in favor of defendants to assess Mrs. Broadwell's damages at such proportion of the whole amount of her lien as the lumber replevied bore to the whole amount in her hands subject to the lien when the writ issued. This was done; but the plaintiffs claim that there was included in this an amount of railroad charges which had been paid by Lester and Bundy. Assuming

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this to be true, we think no error was committed to the injury of the plaintiffs. The verdict rendered is not claimed to be more than is due Mrs. Broadwell after all proper deductions are made; and as all the lumber was subject to the lien for all that was due on the sawing bills, the judgment cannot be excessive. She had a right to demand payment of the whole before any of the lumber should be taken from her, and the judge erred in favor of the plaintiffs when he made an apportionment to which they had no claim.—*Partridge v. Dartmouth College, 5 N. H., 286.*

It follows from these views that the judgment must be affirmed, with costs.

GRAVES, J., and CHRISTIANCY, Ch. J., concurred.

CAMPBELL, J.

I am inclined to think that, whatever may have been the superiority of plaintiffs' lien under the original contract, over any lien that might be created by their vendees, they lost all right to contest any encumbrance made by the latter, when they purchased a specific parcel of the lumber. By such purchase they could obtain no better title than was held by those from whom they purchased, except on the same conditions which would apply to any other persons making a similar purchase. There can be no doubt of the right of any person to transfer or encumber such title as he has.

But I do not think the contract with defendants is consistent with such a lien. The lumber was to be sawed during the shipping season, if the capacity of the mill should permit. The inspection was not expected to be made except in preparation for shipments, and it was not contemplated that the lumber should remain a month, or any time at all, beyond what might be required for removal. Under these circumstances a stipulation that payments

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should be made "as often as once a month after the lumber is delivered out of said mill" would not justify a demand for any payment at shorter intervals, and could not, I think, be made consistent with the existence of any lien, unless the lumber was required to be kept that long before shipment. No one can draw this inference from the contract. On the contrary, the shipping inspection was the only means whereby it could be ascertained what had been so delivered. The sawyers were to assort and keep the grades and kinds of lumber separate. The mill culls were, by the express terms of the contract, to be "estimated at the mill." The rest could only be estimated by inspection on the dock, and it is evident it was to be taken there as fast as sawed, and to be shipped as soon as the owners chose. They could, if they chose, transport it elsewhere themselves. They were not bound to make their sales at that place. Cargoes might and would naturally be shipped immediately after manufacture, and before a small fraction of the month's credit had run out. A construction which requires payment to be made at once upon inspection seems to me to render the whole credit clause nugatory. The fact that the parties all regarded the contract as creating no lien is not sufficient to destroy one if it existed; but it shows at least that such a construction is a natural one. The parties must have calculated on raising money from sales of lumber, or there would have been no obvious reason for desiring any credit; and they must have contemplated making sales as other men make them, in such markets as should be most acceptable. It is not, I think, consistent with this contract, to confine them to cash sales at the dock, or to compel purchasers to take subject to a lien, and to run risks in regard to it.

I think the judgment should be reversed.

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George E. Hubbard v. George W. Miller and others.

Contracts in restraint of trade: Presumption. Contracts in restraint of trade, which, considered with reference to the situation, business and object of the parties, and in the light of all the surrounding circumstances, appear to have been made for a just and honest purpose and for the protection of legitimate interests, and are reasonable as between the parties, and not specially injurious to the public, will be upheld; and the weight or effect to be given to the surrounding circumstances is not affected by any presumption for or against the validity of the restriction.

Consideration. Such contracts, if unobjectionable in other respects, require no greater pecuniary or valuable consideration to support them than any other contract; and if objectionable in other respects no amount of pecuniary consideration will render them valid.

Contracts in restraint of trade; Consideration. When one who is engaged in any branch of business purchases the business and stock of another engaged in the same branch of business, on the condition that the vendor shall not further carry on this particular branch of business within a reasonable extent of territory, such restraint of trade, being reasonable and fair between the parties, will be enforced; and the fact that the price paid does not exceed the cost of the goods purchased does not affect the validity of the contract.

Contract construed. An agreement made in consideration of such a purchase of the business of sinking drive wells and keeping and selling the materials therefor at Grand Haven, that the vendors would not "keep well-driver's tools or fixtures, or engage in the business of well-driving," is construed to impose a restraint upon the carrying on of such business at Grand Haven and within such limits about that city as this business there located would naturally and reasonably embrace, and not such a general and unlimited restraint of trade as to be void; and is sustained as reasonable, and enforced by injunction.

Equity pleading and practice: Injunction: Parties. This sale and agreement having been made by a firm of two persons, one of whom afterwards went into the business alone, and the other as a partner with a third person who is made a defendant, the injunction is limited as to such third person, to prevent him simply from engaging in the business as a partner with either of the other defendants, and not to restrain him individually.

Heard January 11. Decided April 15.

Appeal in Chancery from Ottawa Circuit.

Boynton & Pratt, for complainant.

Akeley & Stewart, for defendants.

CHRISTIANCY, CH. J.

This was a bill for a perpetual injunction to restrain the defendants from carrying on the business of putting

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down "drive wells," called the "American Drive Wells," (consisting mainly of an iron tube driven into the ground, and a pump attached) and from selling or dealing in the tools or apparatus used for that purpose in the city of Grand Haven, and (as the bill expresses it) "the adjacent vicinity."

The defendants Miller and Decker answered this bill, and defendant Akeley demurred generally. The case was heard in the court below upon pleadings and proofs, and the bill dismissed. The complainant appeals to this court.

The case stated in the bill and sustained by the evidence may be stated substantially as follows: The complainant in September, 1870, and for some time previous thereto, was engaged in carrying on the business of a general retail hardware store in the city of Grand Haven, including the tubing and all necessary apparatus and tools for sinking the drive wells above mentioned, and in connection therewith was also engaged in putting down such wells for those who chose to employ him. And two of the defendants, George W. Miller and Adolphus M. Decker, as partners under the style of "George W. Miller & Co.," kept a like hardware store in the same city, and, like the complainant, kept on hand the tubing and other materials used in putting down such wells, and were engaged in putting them down for those who chose to employ them.

It does not clearly appear how extensive was the territory in which any of the parties were then engaged in putting down wells, or in which customers were supplied by them with the articles in question; but so far as does appear it is fairly to be inferred that this business was mainly confined to the city and a comparatively small portion of country around it, and there is nothing from which we can reasonably infer that it extended beyond the limits of the county of Ottawa, nor, in fact, so far as to include within its limits any other village or city the business of which would be likely to warrant or secure the establishment of a retail hardware store. And both the complain-

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ant and George W. Miller & Co. seem to have been of the opinion that the business would not be remunerative or profitable to either concern, while both continued to carry it on and to compete with each other, though there might be enough to make it a paying business for one of them. With this view complainant proposed to Miller & Co. to purchase out all that portion of their stock of materials pertaining to the well business, and to pay them the cost price of the same (including freight), if they would cease to do that kind of business. This was assented to by that firm, and a bill of items with the cost of each article was made out, headed, "Mr. George E. Hubbard, bought of George W. Miller & Co., dealers in general hardware, Washington street."

The items footed up amounted to..... $296 19
To which was added: "Add for freight, 5 per cent. 14 80

$310 99

At the foot of the above bill and preceding the signature of Miller & Co. was written the following: "In consideration of the above sale we agree not to keep well-drivers' tools or fixtures, and not to engage in the business of well-driving after this date.

"Received payment.

(Signed) "GEO. W. MILLER & Co."

The defendants, Geo. W. Miller & Co., continued in the same general retail hardware business as before, with the exception of the particular branch of it pertaining to the drive-well business (which seems to have been but a comparatively small part of it), until January or February, 1871 (the bill says January, the answer, February, and the evidence does not show which), when the firm of George W. Miller & Co. was dissolved, and the dissolution publicly announced. And immediately thereafter the said George W. Miller and the defendant Akeley entered into a new partnership under the former name of George W. Miller & Co., in the same retail hardware business, which they carried on

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in the same store formerly occupied by the old firm of George W. Miller & Co. when Decker was one of the partners. And the defendant Decker (who had been a member of the former firm), about the same time—the winter of 1871—rented another store in the immediate vicinity of the store of complainant, and also went into the like general retail hardware business.

In April, 1871, the new firm of George W. Miller & Co., (composed of Miller & Akeley), commenced keeping and selling the same kind of materials and articles pertaining to the drive-well business, and went into the business of sinking the same kind of wells, which, by the agreement mentioned above, the old firm had bound themselves not to do—Akeley, as he admits by his demurrer, having notice of that agreement. And soon afterwards the defendant Decker also commenced keeping the same kind of articles in connection with *his* hardware business, in disregard of the agreement of the firm of George W. Miller & Co., to which he, as a member of that firm when the agreement was made, was a party. And both said new firm of George W. Miller & Co. and the said Decker still continued in such well-driving business and in the sale of such prohibited articles, in spite of complainant's remonstrances, down to the time of the filing of the bill.

The only ground of objection relied upon by the defendants in this court, to the case made by complainant, or the relief asked, are (stating them in their logical order):

1. That the contract relied upon being in restraint of trade, must be presumed void unless shown to be based upon some special and peculiar consideration; and that the only consideration paid being the cost price of the goods at Grand Haven, this is not sufficient to support the restraint contracted for, though the contract should in other respects be valid; and, 2d, that the restraint imposed upon Miller & Co. by the contract, is void, because general and unlimited as to place, forbidding the vendors to enter upon the prohibited business anywhere.

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The first objection is wholly independent of the second, and in considering it we must proceed upon the hypothesis that the contract would, but for the first objection, be valid. It has sometimes been said by text writers, and even by courts, that all contracts in restraint of trade, whether general or limited, are *prima facie* void, or that they are to be presumed void, until it be shown, not only that there was an adequate consideration, but that the circumstances under which the contract was made were such as to render the restraint reasonable. But the rule to be drawn from a careful analysis of the adjudged cases and the reasons upon which they are founded, does not seem to us to involve any such presumption in the accurate or legal sense of the term, and may be more correctly stated to be, that all contracts in restraint of trade are void, if considered only in the *abstract*, and without reference to the situation or objects of the parties or other circumstances under or with reference to which they were made; and this, though the pecuniary consideration paid may have been sufficient to support the contract in any other aspect, or any ordinary contract for a legal purpose; or even though it may be sufficient in value to compensate the restraint imposed. But if, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid. A contract of this kind requires no greater pecuniary or valuable consideration to support it than any other contract; but such consideration, however valuable, will not of itself support it. Whether it can be supported or not, depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration; it will depend upon the situation of the parties, the nature of their busi-

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ness, the interests to be protected by the restriction, its effect upon the public; in short, upon all the surrounding circumstances; and the weight or effect to be given to these circumstances is not to be affected by any presumption for or against the validity of the restriction; if reasonable and just, the restriction will be sustained, if not, it will be held void. To illustrate, in fact, by a single example: If A, who is not engaged in the business of keeping a public house, or a dry goods store, or a saddler's shop, and does not contemplate entering upon or being interested in such business, goes to B, who is engaged, or preparing and about to engage, in such business, and takes a contract from B not to continue or engage in such business in a particular city or village or other territory, defined or undefined, such a restriction would be void, whatever pecuniary consideration might be paid for it. A can have no legal interest in, and can derive no benefit from, such a restraint, and has no legal interest in its observance; and it would be imposing a restriction upon B which might be burdensome to him without any corresponding benefit. It would, therefore, be wholly unreasonable and void. But, on the other hand, if A, being already engaged, or about to engage in any such business, should purchase out the stock and business of B, or any particular branch of it with the stock pertaining thereto, on the condition or upon the terms that B should not further carry on that business, or the particular branch of it, within the town where located, or other reasonable extent of territory to which the business might probably be extended by A, and B should thus contract, this restraint under such circumstances would be fair and just and reasonable between the parties, one of whom gives what, without such restraint, he would not have given, and the restraint contracted for being an essential consideration, without which the vendor could not have made the sale for the price received, and the purchaser would not have bought; and such restraint being a benefit to the purchaser and not specially injurious

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to the public,—as every other person except the vendor is still at liberty to engage in the same business within the same limits: such a restraint, under such circumstances, would be fair, reasonable and valid, and would be enforced like any other valid contract.

Now, the circumstances of the present case, the nature of the business, the situation, objects and interests of the parties, are precisely of the character which bring the case within these principles as recognized by all the authorities for the last one hundred and fifty years, at least. The fact that complainant paid no more than the cost of the articles at Grand Haven can make no difference. Where a consideration recognized by law as being valuable is paid, the law very properly allows the parties to judge for themselves of the sufficiency in value of such consideration for their contracts. We cannot, therefore, enter into the question whether the consideration was commensurate in value with the restraint imposed. See *Hitchcock v. Coker, 6 Ad. & E., 438; Pilkington v. Scott, 15 M. & W., 657; Hartley v. Cummings, 5 C. B., 247.* And there is no reason for holding that, without the restraint contracted for, complainant would have been willing to purchase for the price he gave, nor can we say that the vendors could have sold at that price without such stipulation. In fact, we must infer that, in their opinion they could not readily have done so without it, or they would not have given it. It is clear, at all events, that they thought the sale with the stipulation an advantageous one or they would not have made it. The contract must, therefore, be held fair, reasonable and valid, unless too general and unlimited as to place, as insisted under the second objection.

It is true, there is no limitation as to place or extent of territory over which the restriction was to extend, by the express words of the contract. It is entirely silent upon this point, and it is urged that the restraint is therefore general and unlimited as to territory, and would apply to

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any place where the vendors might attempt to carry on this branch of business. But was this the meaning and intention of the parties? The contract imposing the restraint is brief and informal, written by one of the parties at the bottom of the bill of the goods sold. All contracts should be construed according to the intention of the parties; and in ascertaining that intent from this informal mercantile contract, it is especially proper to look to the whole subject matter of the contract, the situation of the parties, the nature and extent of the business, the purposes to be accomplished by the restriction, and all the surrounding circumstances to which the parties must be supposed to have referred in making it. Thus considered, when the defendants, Miller & Co., sell out this particular portion of their stock to complainant, who keeps the same articles and is engaged in the well-driving business, and agree for the future not to keep such articles for, and not to engage in, the business of well-driving, we think it reasonably certain that all parties understood this to refer to the keeping of such articles for sale at Grand Haven, the place where all parties were doing business, and for some space, at least, around it; and, considering the object of the restriction, it may be inferred to have been intended to prevent the vendors from competing with complainant in the sale of such articles and in the putting down of wells over an area around the city in which the people did then, or would naturally in the future, resort to that city for the purchase of such wells and for procuring parties to put them down. But we see no reason to infer an intention to restrain Miller & Co., should they remove to Grand Rapids (40 miles), or to any other city or village, however near, and large enough to warrant the establishment of such a store, from establishing in such city or village a store of this kind, including for sale the articles in question, or from engaging in putting down wells in connection therewith. And, supposing a contract imposing an unlimited restraint to be valid, if Miller & Co. had established such business in Grand

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Rapids or such other town or village, we should, I think, unhesitatingly say, this is no violation of the present contract, because not within the intention of the parties. And we must, therefore, say that in any such town or beyond such area about the city of Grand Haven, this restriction was not intended to operate. And in view of all the circumstances it is simply preposterous to say that complainant contemplated putting down these wells over the whole state and supplying the people of the whole state with the materials for that purpose.

The sale to the complainant with the restriction contracted for was somewhat analagous to the sale of a good-will, differing mainly in the fact that it was a sale of only a portion of the business, and did not include the building or business stand, which usually, if not always, accompanies the sale of a good-will, strictly so-called. And though there may be some difficulty in defining the exact territory by metes and bounds over which this restriction in some of its phases was intended to apply, it is at least clear enough that it was not intended to be unlimited as to area, but that in any fair view which can be taken of it, it is confined to a comparatively small extent of territory and wholly unobjectionable on this ground, fair and reasonable between the parties, and not materially prejudicial to the public; and that it should be enforced as far as capable of enforcement. But if the contract were equally susceptible of the construction claimed for it by the defendants (which we think it is not), as parties are not lightly to be presumed to intend a violation of the law, it would still be our duty, according to the well settled rules of law, to adopt the construction which would make it conform to the law, rather than that which would make it violate the law. See *Church Wardens of St. Saviour, 10 Rep., 67 b.; Archibald v. Thomas, 3 Cow., 284; Coke Lit. 42, 183; Attorney General v. Chapman, 31 Eng. L. & Eq., 142; Many v. Beekman Iron Co., 9 Paige, 188; Shore v. Wilson, 9 Clark & Fin., 397.*

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But, though the contract is legal and fair, and the restraint does not apply to an unreasonable extent of territory, we may not be able by injunction to give the complainant the full benefit which the contract was intended to give him, by reason of the absence of any specific and defined boundaries in the contract to which the restriction should apply. But this consideration should not prevent us from giving the relief sought, so far as the right is clear and the limits ascertainable with reasonable certainty, taking care to keep clearly within the intended limits. It was manifestly the intention of the contract first, to restrain Miller & Co. from keeping on hand or selling the articles in question within the city of Grand Haven, whether to be used by themselves or others in the sinking of wells, and to prevent them from keeping or in any way furnishing them there, wherever or by whomsoever intended to be used. Thus far there is entire certainty.

But, second, it is equally clear that the restraint against keeping or selling such property was not intended to be confined strictly to the city limits, but to extend far enough to prevent a mere evasion by keeping and selling such articles in such immediate proximity to the city as materially to lessen the value of the restriction. It is, therefore, safe to say that the vendors were not to be at liberty to keep or sell such articles within one mile of the city limits; and as their own interest would be a sufficient protection against their establishing a place for the keeping and sale of such articles anywhere between there and the next city or village, as they could expect few customers, it is unnecessary to discuss the right to keep or sell within that intervening space.

But, third, Miller & Co., were intended to be allowed to establish a hardware store in any other city or village where the business would warrant its establishment, and in connection therewith to keep and sell the articles in question and engage in putting down wells in any place where their customers should choose to employ them.

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But fourth, from the nature of the business of sinking wells, we may safely conclude that it was not expected or understood to be confined to so limited a territory as that to which the prohibition against the selling was to apply. But the contract, and the evidence produced in this case, showing the extent of its application, do not authorize us to enforce the restrictions by injunction over a larger extent of territory than above indicated, though we think it quite clear the prohibition against putting down wells, as an independent business not connected with a hardware store at Grand Haven, was intended to have a more extensive operation. But in case said defendants shall attempt to carry on such business as an independent business not connected with a hardware store, outside of the limits above indicated, the complainant must be at liberty to test their right in an action at law upon the contract, or in a new suit in equity upon such new state of facts as may be shown.

The decree of the court below dismissing the bill must be reversed with costs; and a decree must be entered in this court for a perpetual injunction upon the principles, and to operate within the limits, above indicated.

The defendants, Miller and Decker, are bound individually, as well as jointly, by the direct effect of the contract. But Akeley, not being a party to the contract, is bound only as a partner of Miller (he would be equally bound if a partner of Decker), and during the continuance of such partnership; and, upon its dissolution, would not be individually bound by the contract. This must be observed in framing the decree.

The other Justices concurred.

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Eli G. Bennett v. Hiram B. Robinson.

Possession of land: Complaint: Surplusage. In summary proceedings under the statute (*Comp. L. 1871, § 6706-23*) for the possession of land, a complaint which sets out that the respondent is in possession of the premises, describing them, and contains the usual allegations of the common printed form, but with the blanks for the names left unfilled, and concludes that the respondent, "*therefore*, holds said premises unlawfully and against the right of this complainant, and that this complainant is entitled to the possession of the same," etc., is sufficient; the printed portion, with the unfilled blanks, being treated as if erased, and the word "therefore" rejected as surplusage.

Possession: Presumption: Notice. The continued possession of a grantor long after the recording of his deed to another, may raise a presumption that, as between himself and his grantee, he has either retained, or since acquired some right to the land or its possession. This case and *Bloomer v. Henderson, 8 Mich. 395*, distinguished.

Deed: Right of possession: Contract to reconvey: Holding over: Tenancy by sufferance. The right of possession transferred to the grantee by a deed absolute on its face is not defeated by a subsequent contract to reconvey in the future upon certain conditions, which is silent upon the subject of possession; and the grantor holding over becomes tenant, either by sufferance or at will, of his grantee.

Possession of land: Adverse titles: Evidence. Adverse titles cannot be tried in the summary proceedings provided by statute to recover possession of lands; but deeds of conveyance may nevertheless become competent evidence in such proceedings.

Evidence: Privity: Tenancy by sufferance. An objection to a deed offered in evidence in such proceedings, that it does not tend to show any privity between the parties, is not tenable; privity between the parties is not required to be shown, and in cases of tenancy by sufferance, at any rate, does not exist.

Tenancy: Notice. In this case the question whether the tenancy was one at will or by sufferance merely, became immaterial, since both are required to be terminated by the same notice.

Heard January 13. Decided April 15.

Error to Branch Circuit.

E. G. Fuller, for plaintiff in error.

Ashley Pond, for defendant in error.

CHRISTIANCY, CH. J.

This was a summary proceeding instituted by Robinson against Bennett before a circuit court commissioner, under *chapter 123 of the Revised Statutes of 1846* (*Comp. L. of*

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1871, chapter 211), to recover the possession of about half an acre of land in the village of Bronson, with a dwelling house thereon in which Bennett and his family resided.

Robinson recovered a judgment of restitution before the commissioner, and Bennett appealed to the circuit court for the county of Branch, where the case was tried before the court without a jury, and a judgment again obtained by complainant, which Bennett now brings to this court by writ of error and bill of exceptions.

There was a full finding of facts by the court, which (omitting unimportant details not affecting the main facts stated below) were as follows:

Defendant Bennett, on the 23d day of December, 1867, being then the owner of the premises, by a warranty deed (in which his wife joined) conveyed them to one Nichols. The deed was absolute and in the usual form (except that the covenants of warranty did not expressly extend to incumbrances), and was duly recorded in the office of the register of deeds, February 1, 1868; but Bennett, the grantor, still remained in possession; and on the 28th day of September, 1869, an agreement was executed in duplicate between Nichols (the grantee) and Bennett (the grantor), by which Nichols agreed that Bennett might, at any time within three years from date, pay the full amount of his indebtedness due to said Nichols and one Nathan Wheeler, in which case said Nichols should deed back the title to said lands. But this instrument does not seem to have been acknowledged, and was never recorded.

On the 21st day of May, 1870, Nichols sold, and (with his wife) conveyed the premises to complainant Robinson by a quit-claim deed (recorded June 7, 1870), for a valuable consideration,—Robinson having no notice of the special unrecorded agreement between Nichols and Bennett, unless the continued possession of Bennett is to have the effect to charge him with notice of it.

On the 27th of February, 1871, complainant Robinson personally served upon defendant Bennett a written notice

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to quit and deliver up to him the possession of the premises (describing them), within three months thereafter, adding after the description of the premises, "which you hold of me as tenant at will."

This notice not being complied with, the complaint in this case was made before the commissioner on the 3d day of July, 1871.

A preliminary objection was taken to the sufficiency of the complaint for want of the necessary averments in it to give jurisdiction. The complaint set forth that defendant, "Bennett, is in possession of the following described lands and tenements," (describing them). Then follows what seems to have been the form of a printed blank, with the blanks left unfilled, as follows:

"That ——— is the owner and landlord of said premises, and said ——— is the tenant under him, and that said ——— holds over said premises after the time for which they were demised or let to ———. That said ——— holds over said premises contrary to the conditions and covenants of the lease or agreement under which ——— holds. That said ——— has refused and neglected for fourteen days after demand of possession," etc., and then closes as follows:

"That said Eli G. Bennett, *therefore*, holds said premises unlawfully and against the right of this complainant, and that this complainant is entitled to the possession of the same;" closing with the prayer for process, etc.

It is urged that the specific ground upon which complainant claims the possession of the premises, and upon which he claims that defendant unlawfully withholds them, ought to be stated; and the blanks in the complaint being left unfilled, no premises are laid for the conclusion stated, that defendant, "*therefore*, holds said premises unlawfully," etc.

It is true, that in form the word "therefore," and the clause following it, treated only as a conclusion, might seem to be inconsequent. But the grammar may be

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faulty, and the complaint good, notwithstanding. And it is quite clear, within our own decisions, that the allegation of defendant's unlawfully holding the premises is good, though no premises be stated from which it would follow as a conclusion, if it be stated that defendant is in possession and that he "holds them against the right of complainant;" since the statute itself (*Comp. L. of 1871, § 6707*) merely requires the complaint to state such possession by the defendant, and that "he holds the same unlawfully and against the rights of complainant." The rest is matter of proof.—*Bryan v. Smith, 10 Mich., 229;* and see *Vos v. Dykema, 26 Mich., 399.* This complaint must be treated precisely the same as if the clauses of the printed blank left unfilled had been left out or erased; and the word "therefore," in the connection in which it is found, being without meaning, must be rejected as surplusage.

The circuit judge found, as a conclusion of law from the facts, that the deed from Bennett and wife to Nichols was, as between them, a mortgage, but the defeasance not being recorded, the deed and the record thereof was only notice to Robinson of an absolute conveyance of the title to Nichols, and that the possession of Bennett, under such circumstances, was no notice to Robinson of any rights or equities of Bennett in the land; resting this conclusion, as it would seem, upon the decision of this court in *Bloomer v. Henderson, 8 Mich., 395.* But the conveyance in question in *Bloomer v. Henderson* was comparatively recent, and the possession had continued but a short time when the right of the purchaser of the mortgage accrued; and for this reason, under the circumstances of that case, to have allowed the grantor's continued possession to operate as a notice of his rights and of the fraud by which the deed was obtained, would have been to allow him to make his own culpable negligence a trap to the purchaser of the mortgage. But in the present case Bennett had remained in possession two years and about eight months after his deed to Nichols, when Robinson purchased of the

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latter. And it is, we think, quite manifest that the possession of a grantor after the conveyance from him has been recorded, may be continued for so long a period as to afford ground for a probable inference or presumption that he must, as between himself and the grantee, have either retained or since acquired some right to the land or its possession. We do not, therefore, feel quite satisfied to place the right of Robinson, the complainant, upon this ground, after so long a possession by Bennett; especially as there is another view of the case leading to the same result and resting upon more satisfactory ground.

Bennett's deed to Nichols was absolute and without reservation, and clearly conveyed to Nichols the right of possession. The agreement of Nichols that he would reconvey upon payment of certain debts within three years was not made until one year and nine months after the deed; and this contract says nothing upon the subject, and of course, therefore, gives no right of possession to Bennett. And there is not enough in the evidence to show that, as between the parties themselves, the deed was reduced or amounted to a mortgage only, until after the execution of the agreement. Whether, when it was executed, it had the effect to make the whole transaction a mortgage only, or was more properly a contract for a resale, we need not determine; since, if the transactions taken together then amounted to a mortgage, so far as related to the right of redemption and the necessity of foreclosure to make an absolute title, yet it was not an ordinary mortgage, leaving the right of possession in the mortgagor, but one which placed the right of possession in the grantee or mortgagee. See *Wetherbee v. Green, 22 Mich., 311.*

The conveyance made by Nichols to the complainant operated at least as an assignment of this mortgage, if it were only such, and a transfer of the right of possession before vested in Nichols.

But the introduction of the deeds from Bennett to Nichols and from the latter to the complainant, was objected

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to, on the ground that this is not a proceeding in which the title can be tried, and that they did not tend to show any privity between complainant and defendant, or that the latter was the tenant of the former.

It is quite true that this is not a proceeding in which adverse titles can be tried; and if complainant had set up a claim to recover possession of the premises under a title hostile or paramount to that which defendant had conveyed to Nichols, the court would have had no jurisdiction to try it in this proceeding. But the statute expressly provides that "the person entitled to the premises may recover the possession thereof" in this proceeding (among other cases), "when any tenant at will or by sufferance shall hold over after the termination of his estate by a notice to quit, as provided by law."—*Comp. L. of 1871, § 6706.* And *section 4304* (of the same compilation) declares that "all estates at will or by sufferance may be terminated by either party by three months' notice given to the other party." These provisions are positive, general and without exception or qualification, and apply to all cases of tenancies at will or by sufferance, and would be nullified in any case where the court should deny the complainant the right of proving any state of facts going to create or establish either of these species of tenancies, whether that proof should consist of deeds of conveyance or any other evidence.

The statute says nothing of privity between the parties, and certainly none can be required by implication, in the case of a tenancy by sufferance; since there never was any privity, either of contract or estate, in that kind of tenancy; and to require it would be to take this species of tenancy out of the statutes. See *1 Washb. on R. Pr., 335 (3d ed.)*

The New York statutes are very different from our own in respect to the tenancies by sufferance to which these special proceedings are made applicable. The proceeding is there confined to those classes of cases, whether tenancies by sufferance or otherwise, in which the *conventional* rela-

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tion of landlord and tenant exists, and applies, so far as tenancies by sufferance are concerned, only to that particular class of them which arises from holding over after the expiration of a lease or term, and (by special provision) to lands sold on execution. This is sufficiently apparent from the judgment in *Sims v. Humphrey, 4 Denio, 185*, where the peculiarities of their statutes are set forth.

It needs but a glance at our statutes in connection with the case just cited to show that the proceeding is not thus confined in this state, so far as tenancies by sufferance are involved.

Now it is clear, within the decision of this court in *Allen v. Carpenter, 15 Mich., 25*, that Bennett remaining in possession after his conveyance to Nichols, became a tenant by sufferance to him, and that by the conveyance of Nichols to complainant the defendant became tenant by sufferance to the latter. And though the special unrecorded agreement between Nichols and Bennett might, as between them, have changed their relation to that of mortgagor and mortgagee in a modified sense, yet this, as already shown, did not affect the right of possession, which was in Nichols by the deed, and was conveyed to complainant by Nichols' deed to him.

It is true, that whenever the continued possession of Bennett should have been clearly assented to by Nichols, or after him by complainant, so as to become clearly a holding by the assent, instead of the mere laches, of the owner, or mortgagee, the possession would cease to be wrongful (which a tenancy by sufferance to a certain extent always is), and the tenancy by sufferance would be changed to one at will. But whether any such change had taken place when this proceeding was instituted, is quite immaterial; since, for the purposes of this proceeding, the result would be precisely the same. Both kinds of tenancy are now required to be terminated in the same way, by a three months' notice. This was given, and was sufficient to terminate the tenancy, whether at will or by sufferance.

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The circuit court was, therefore, right in holding that the notice was good, though it may have called the tenancy by one name, when it may in fact have been the other. It is not necessary to determine whether it was at the time one or the other.

There was no error in the judgment or proceedings of the circuit court, and the judgment of that court must be affirmed, with costs to complainant in this and the circuit court.

The other Justices concurred.

Amasa M. Pardee v. James Smith.

False imprisonment: Certiorari: Objections: Practice in supreme court. Where a justice's judgment in a suit against a justice of the peace for false imprisonment by the issuing of a warrant against the plaintiff, is brought to the circuit by *certiorari* and there affirmed, only such objections to the validity of the proceedings for the imprisonment, will be considered on error to review the determination of the circuit, as were passed upon in the court below.

Capias: Civil suit: Irregularities: Jurisdiction: Waiver. In the case of a *capias* in a civil suit, irregularities or errors, however serious, if not jurisdictional, cannot be attacked collaterally; and such irregularities and errors may be waived by a failure to take advantage of them in time, so as not to be open to objection even in a direct proceeding to review the judgment.

Whether, in an action for false imprisonment, where the proceedings for the arrest complained of were in fact criminal in character, but were treated by both parties as civil, the court would be justified in holding the plaintiff to the same rules as if they were civil proceedings:—*Quære?*

Statute construed: Criminal proceedings: Judgment. Proceedings under the statute (*Comp. L. 1871, § 1998*), to enforce a penalty for keeping billiard tables, etc., are criminal in character; the judgment provided for, being both a fine and security for good behavior, etc., for a year, is an entirety, and no right to prosecute separately for the fine is prescribed; such a judgment is peculiar to criminal remedies and quite foreign to those of a civil nature.

Statutes construed: Civil suit: Judgment. Neither section 6268 nor section 6848 of the Compiled Laws of 1871 warrant the recovery of such a judgment in a civil suit.

Statutes construed: Justice of the peace: Jurisdiction: Offenses. Justices of the peace have not jurisdiction to try and determine cases under the statute in question (*Comp. L. 1871, § 1996*); the statute (*Comp. L. 1871, § 6686, sub. 6*)

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giving them authority to hear and determine "all other offenses punishable by fine not exceeding one hundred dollars, or punishable by imprisonment in the county jail not exceeding three months, or punishable by both said fine and imprisonment," does not include such an offense.

Statute construed: Gaming: Complaint: Warrant: Justice of the peace: Examination: Prosecuting attorney. A complaint and warrant based upon this statute are to be construed as preliminary steps in a criminal procedure looking to an examination, as provided by chapter 259 of the Compiled Laws of 1871, and not to a trial before the justice; and the intervention of the prosecuting attorney is not essential to their validity.

Complaint construed: Collateral attack: Jurisdiction. The complaint in question in this case, though not full, direct and precise in its statement of facts, or technically accurate, is held sufficient to give jurisdiction, and therefore not open to objection when attacked collaterally.

An allegation in such complaint that the respondent "has incurred a penalty by the violation" of the statute (naming it by page and section) and that the billiard table was kept in his house, and was resorted to for play with his knowledge and consent, is a statement, by implication, and in argumentative form, that the table was kept in a house "by him actually used or occupied;" and is not open to objection for want of jurisdiction on this ground, in a collateral proceeding.

Heard January 13. Decided April 15.

Error to Jackson Circuit.

G. T. Gridley, for plaintiff in error.

Johnson & Montgomery, for defendant in error.

GRAVES, J.

The plaintiff in error, Pardee, was a justice of the peace of the township of Spring Arbor, in Jackson county, and on the 26th of June, 1871, one John S. Patterson made to him in writing and on oath the following statement and representation:

"STATE OF MICHIGAN, COUNTY OF JACKSON, *ss.*

"John S. Patterson being duly sworn upon his oath, makes complaint and says that one James Smith *has incurred a penalty by the violation of section 1588, chapter 44 of the Compiled Laws of the state of Michigan, on page 502;* that the said James Smith on the first day of June, A. D. 1871, and on divers other days and times since that, and is now at this date, at the township of Hanover, in said county of Jackson, engaged in keeping in his house, there situate, a

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table for the purpose of playing at billiards for hire, and that persons do resort thereto for the purpose of playing at billiards, with the knowledge and consent of said Smith, and this complaint is made for the purpose of having said Smith arrested for said offense.

(Signed) "JOHN S. PATTERSON.

"Sworn and subscribed to this 26 day of June, A. D. 1871.

"By A. M. PARDEE, Justice of the Peace."

The plaintiff in error thereupon issued a warrant directed to the sheriff or any constable of the county, and reciting the complaint, and then proceeding in the following terms: "And, whereas, on examination on oath of the said ——— by me, the said justice of the peace, it appears to me the said ———, that the said *offense has been committed, and there is just cause to suspect the said Smith to have been guilty thereof;* therefore, in the name of the people of the state of Michigan, you and each of you are hereby commanded *forthwith* to take the said James Smith and bring before me, the said undersigned justice of the peace, *to be dealt with according to law.* Given under my *hand and seal,* at Spring Arbor, in said county, on the 26th day of June, A. D. 1871.

(Signed) "A. M. PARDEE, Justice of the Peace."

The defendant in error, Smith, was arrested on this warrant, and taken before the plaintiff in error towards night on the 27th of June, and at once informed Pardee that he was ready for trial; but Pardee informed him that it was then late, that the complainant was not there, and that the business could not go on then.

The case was accordingly then postponed by Pardee, and Smith was left in the custody of the arresting officer. The record fails to disclose all that occurred on this occasion, and it does not appear from it whether Smith consented to the postponement or not, or whether he made any objection to being left in the care of the officer. There are some indications that Pardee proposed that bail

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should be given and that Smith declined, but they are faint and unimportant.

On the 29th of June, Smith appeared, attended by Mr. Snow as his counsel, and another gentleman of the bar appeared and responded for the people.

At this time Smith's counsel objected to the proceedings on the ground that the word "billiard" in the warrant was spelt with one "l" instead of two; and this objection, which was overruled, seems to have been the only one raised by Smith. The way was then deemed open for further proceedings, and without any question on either side as to the propriety or regularity of such a course, a declaration was filed in the name of the people, founded on the law mentioned in the complaint, but in the form of *indebitatus assumpsit*, and alleging a promise by Smith to pay the people one hundred dollars; and to this, Smith pleaded the general issue. Thereupon on his motion the case was adjourned until the 8th of July, and at which time, also on his motion, a jury was called, and the issue on the declaration and plea was tried, and a verdict found against him for eight dollars damages, upon which judgment was entered. None of these proceedings appear to have been appealed from or disturbed.

About two days after this judgment, Smith brought an action against Pardee before another justice, in the form of trespass for false imprisonment, and counted upon his arrest and custody under the before mentioned warrant as his actionable grievance. He recovered twenty-eight dollars damages and his costs. Pardee obtained a review of this judgment in the circuit court by *certiorari*, and the judgment was affirmed. He then sued out this writ of error.

The correctness of the judgment of the court below is admitted to depend upon the validity of two objections brought against the early proceedings in the case against Smith, and it is not contended that the judgment against Pardee can be supported if such objections ought not to prevail.

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These objections are: *First*, that Pardee as a justice of the peace acquired no jurisdiction to issue the warrant against Smith, because, as is claimed, the complaint was insufficient in this: that it did not state that his house where the table was kept, was "used or occupied by him;" and, *second*, that the prosecution was instituted by a private person and not by a public officer.

It will not fail to be observed that throughout the case before Pardee, Smith construed it as a civil and not a criminal proceeding, and shaped his course and defense on that assumption, and that his position in this court rests upon that hypothesis. It is also noticeable that the other side, from the time of the arrest, proceeded conformably to the same idea.

The whole proceedings, from the appearance on the 29th of June, were in form and substance civil. The validity of the first step is now called in question collaterally; and if that step was one in a civil prosecution, as Smith all along regarded and treated it, and as he still persists in construing it, and as Pardee, the justice, and the gentleman who appeared for the people, assumed it to be, on and after the appearance on the 29th of June, there would seem to be a decisive reason for holding that the defect in the complaint, if material, is not open to an objection by Smith in this action. It was, at most, as a showing for civil process, an irregularity or error not going to the jurisdiction. The statute defining the offense and giving the right to sue was expressly named, and it was also declared in round terms in the affidavit, that Smith had incurred the penalty prescribed. The nature of the offense imputed was not left in doubt, nor was Smith misled by the imperfection of the affidavit. The record discloses that in its inception the prosecution had the sanction of the prosecuting attorney, and that it was carried to completion under his authority. Pursuing the view then taken by Smith and on which he has steadily acted, and in which the other side have acquiesced since the appearance on the 29th of June, that

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the prosecution from its beginning was civil and not criminal, the warrant must be regarded as a mere civil *capias* to bring Smith into court; and if marked by irregularities or errors, however serious, but not going to the jurisdiction, it would not only not be exposed to attack in this collateral way, but would, after what occurred, be protected against objection based on such errors or irregularities, even though such objection were made in a direct proceeding to impeach the judgment.

He made no objection before Pardee except that a word was misspelled in the warrant. He procured an adjournment on his own motion. He joined issue upon the merits. He demanded a jury. He went to trial on the merits. He made no attempt, so far as appears, to have the proceedings set aside. If the proceedings were civil the imperfection in the showing for the warrant or *capias* was waived.—*Dempsey v. Paige, 4 E. D. Smith, 218; Swartwout v. Roddis, 5 Hill, 118; Stewart v. Hill, 1 Mich., 265; Falkner v. Beers, 2 Doug., 117; Pixley v. Winchell, 7 Cow., 366; Stewart v. Howard, 15 Barb., 26; Hanson v. Hoitt, 14 N. H., 56; Smith v. Whittier, 9 N. H., 464; Carlisle v. Weston, 21 Pick., 535; Ripley v. Warren, 2 Pick., 592; Wright v. Jeffrey, 5 Cow., 15; Moore v. Stockwell, 6 Barn. & Cress., 76; Rittenour v. McCausland, 5 Blackf., 540; Dewey v. Greene, 4 Denio, 93.*

But the complaint and warrant were criminal and not civil proceedings. And when, on the 29th of June, the parties hereto, and the gentleman who appeared for the people, proceeded as in case of a civil remedy, they misapprehended the nature of the complaint and warrant, and departed therefrom. This departure had the tacit assent of all, and it presents a very anomalous state of things.

The rule is general, that a defendant will not be permitted to avail himself of errors to which he himself is a party, and it is not impossible but that the court in this action would be justified on this and other grounds in holding Smith to the same law in reference to his objections

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as though the complaint and warrant had been civil proceedings, as all concerned treated them as being.

But, as it seems advisable to examine the case in another light which leads to the same conclusion, it is not needful to consider this view. The statute (*Comp. L. 1857, § 1538; Comp. L. 1871, § 1998*), on which the prosecution was based, enacts that every offender shall forfeit not exceeding one hundred dollars, "and shall further recognize with sufficient sureties in such reasonable sum as the court shall direct, for his good behavior, and especially that he will not be guilty of any offense against the provisions of this chapter for the term of one year, then next ensuing." It cannot fail to be observed that this law creates the offense, and explicitly prescribes the nature of the judgment, and constitutes the requirement to find sureties an integral part of the judgment. The offender, on conviction, is not only to be adjudged to pay a fine, but is to be adjudged also to perform a personal act. He must give bail. The judgment to be given, as described, is to be a unit, an entirety. The fine, and the requirement to find sureties, are to go together and make one judgment. No provision is made for separating these elements and for the entry of judgment for a part only. As the whole matter is statutory, clear and positive, we are not at liberty to imply an intention to prescribe a right to prosecute separately for the fine. The judgment to be given belongs to the remedy, and the statute creating the offense having marked out the judgment, that judgment is the one appropriated to the case, and the line or course of proceeding which the law has established to produce such a judgment, is the line or course of proceeding also appropriated to the case.—*Rex v. Robinson, 2 Burrow, 799; Thurston v. Prentiss, 1 Mich., 193; Lang v. Scott, 1 Blackf., 405; Gedney v. Inhabitants of Tewksbury, 3 Mass., 307; Smith v. Drew, 5 Mass., 514; Almy v. Harris, 5 J. R., 175; Fletcher v. State Capital Bank, 37 N. H., 369, 392; Marshall v. Nicholls, 12 E. L. & E., 466.*

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This examination is only intended to assist in showing that the legislature designed that the remedy should be in form criminal, and not to establish that a defendant could take advantage of an omission to require him to find sureties in a case otherwise right. That point is not involved and is not considered.

The law, then, contemplates that, in case of conviction on this statute, the judgment shall be not only for the fine, but that the defendant find sureties. And it likewise necessarily implies that the proceedings shall be of a form adapted to the end. Now a judgment of this kind is one peculiar to criminal remedies, and is quite foreign to those of a civil nature. Indeed, no instance is recollected of such a judgment at common-law in a civil suit. To authorize it, a statute would be needed. We must, therefore, suppose the legislature intended that it should be obtained by criminal, and not civil prosecution, in the absence of clear evidence in the statute book to the contrary. No such evidence has been pointed out by counsel, and none has been discovered by the court.

Neither of the provisions relating to civil prosecutions to which we were referred by counsel, is sufficiently pointed and comprehensive to justify the idea that the legislature meant thereby to confer so unusual a power as that of giving such a judgment in a civil case.

The second subdivision of *section 3672, Comp. L. 1857* (*Comp. L. 1871, § 5268*), is confined to the case where a *mere penalty* or *forfeiture* is to be adjudged, and does not contemplate one where in addition thereto the defendant is to be adjudged to find sureties.

Section 5113, ch. 155, Comp. L. 1857 (*Comp. L. 1871, § 6843*) does not clearly give a civil remedy. It makes no reference to a case involving a compound judgment, and it expressly limits the jurisdiction to cases where the amount of the penalty or forfeiture does not exceed one hundred dollars, and would, therefore, seem to exclude cases where by the law the offender must do more than pay the fine

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and costs. It would seem, then, that the law intended that a prosecution on this statute should be according to the forms in criminal cases. An inspection of the warrant shows most clearly that it was not framed as civil, but very plainly as criminal process. This appears from the address, the command, and the whole body and structure of the paper.

Was it issued under the law giving to justices of the peace the power to try particular offenses? If it was, it must have been under the eighth subdivision of *section 3924, Comp. L. 1857* (*Comp. L. 1871, § 5525*), as no other portion of the statute has the least application. That clause authorizes a justice of the peace to arrest and try for offenses *punishable by fine* not exceeding one hundred dollars, or by imprisonment in the county jail not over three months, or by both such fine and imprisonment.

Now the judgment prescribed by the statute on which the prosecution against Smith was based, does not fall in with either branch of this definition. It must be admitted that the finding of sureties is no trivial part of what the law exacts on conviction under that statute. The law and common sense must regard that part of the penal provision as the most efficacious, as in general it must be the most onerous. There are many cases where the requirement to find bail for good behavior is the only substantial ingredient of the sentence, and it will hardly do to say that the legislature, in regulating the jurisdiction of a justice to try by the amount and nature of the infliction, meant to include cases requiring a wholly different infliction, and one, too, which they evidently regarded as specially efficacious.

It may, therefore, be considered that a prosecution on the act in question was not meant to be carried on under the law giving justices the power to try; and recurring to the warrant we see that its form indicates that it was not framed upon that law. That act provides that a warrant

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issued under it shall require the officer to bring the accused before the justice issuing the warrant, "*or some other justice of the same county,*" to be dealt with according to law. The warrant against Smith did not contain this clause. It would seem, then, that he was not proceeded against under this statute.

On recurring to *Comp. L. 1857, ch. 155* (*Comp. L. 1871, ch. 216*), we find it provided by *Comp. L. 1857*, § *5120* (*Comp. L. 1871*, § *6850*) that, "In all cases where the penalty or forfeiture shall be one hundred dollars *or more*, such penalty or forfeiture may be recovered by indictment in the proper court of the county."

In *People v. Hart, 1 Mich., 467*, it was held by this court that a penalty of one hundred dollars given for selling liquor without license, was recoverable by indictment under this section, and that the previous section in the same chapter (*Comp. L. 1857*, § *5113*), conferring power on justices to entertain civil proceedings, did not exclude the criminal remedy in such a case.

Now, if in the case against Smith a civil prosecution was not appropriate, and one criminal in form was, if the case was not one falling regularly within the class triable by a justice and was not commenced as one of that kind, it must have been a case subject to prosecution by information or indictment, and within the law providing for a preliminary examination. The complaint and warrant should, therefore, be tested by that law. The statute regulating those proceedings is *Comp. L. 1857, ch. 194* (*Comp. L. 1871, ch. 259*); and *Comp. L. 1857*, § *5979* (*Comp. L. 1871*, § *7845*) gives the form of the warrant for arrest.

The warrant against Smith followed this section. The provisions of this chapter declare that whenever *complaint* is made to the magistrate that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses produced by him, and that if it appear from such examination that a criminal offense not cognizable by a justice

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of the peace has been committed, he shall issue a warrant directed to the sheriff or any constable of the county, *reciting the substance of the accusation*, and commanding them forthwith to take the person accused and bring him before such magistrate, to be dealt with according to law. When the accused party is arrested the magistrate is to proceed to examine, and he may adjourn from time to time, as may be necessary, without the consent of the accused.

The accusation and warrant against Smith must be referred to this statute. Their form and nature permit this, and they can hardly be harmonized with other regulations. They were preliminary steps in a criminal procedure looking to an examination, and not to a trial before the justice. The intervention of the prosecuting attorney was not needed to validate a complaint or warrant of arrest under this statute, and the preliminary showing was, at all events, sufficient to give jurisdiction to issue the warrant. Though this showing was not full, not amplified by details and explanations, not direct and precise in the statement of facts, nor technically accurate as an indictment or information, it was sufficient to give jurisdiction. It stated *positively* that he had incurred the penalty given by the statute, and in addition thereto it also alleged that the table was kept in his house and was resorted to for play with his knowledge and consent.

Certainly he could not, upon the theory of his own objections, have incurred the penalty which was thus in writing and on oath positively laid to his charge, unless he had used or occupied the house; and the statement that he *had* incurred such penalty was, therefore, a statement, in argumentative form it is true, but still a statement, that he had used or occupied.

This statement then, by implication or inference, imported the existence of the very fact which the objection assumed to be unproved. The further statement, as it stands in the complaint or showing, that the house was *resorted to with his assent*, tends in the same direction. It there-

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fore favored the same inference. However irregular and inartificial this mode of statement, it cannot be claimed to have affected the jurisdiction to issue the warrant. Most clearly it conveyed information in writing and on oath, that a specific offense had been committed, and afforded good ground for belief that further investigation would require Smith to be held. It afforded evidence for the judgment of the justice in a matter upon which it was the duty of the justice to act. The defects, or rather the imperfections, complained of, however irregular, were not jurisdictional.

The objections were not tenable, and therefore the judgments below were erroneous and should be reversed, with the costs of all the courts to the plaintiff in error.

The other Justices concurred.

Jacob A. Polhemus v. The Ann Arbor Savings Bank.

Practice in supreme court: Noticing for hearing. The fact that the bill of exceptions has been removed from the files for amendment by order of the court, and that the amendments are not completed nor the bill of exceptions returned, does not prevent noticing the case for hearing.

Assignments of error. Assignments of error must be specific. *Allman v. Wheeler, 18 Mich., 240,* cited and approved.

Promissory notes: Consideration: Defense: Bona fide purchaser. It is not error for the court in a cause tried without a jury to "refuse to permit a defendant to inquire into the consideration" of the note sued upon "and to contest the note in respect to the consideration thereof," where the evidence is direct and clear and uncontradicted, that the plaintiff is a *bona fide* purchaser.

Whether a decision of this character, made on a trial by the court without a jury, would be reversed where the evidence was conflicting:—*Quære?*

Promissory notes: Pleadings: Execution: Genuineness: Affidavit. A defendant who has failed to file an affidavit denying the genuineness of the note set out in the declaration is precluded by circuit court rule 79 from showing that the note, as described and as produced in evidence, was not as he executed it, and a ruling to that effect is not error.

Practice in circuit courts: Plea: Amendment: Affidavit. The court has power in its discretion to allow a defendant to amend his plea by putting in an affidavit denying the execution of the note declared upon.

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POLHEMUS v. ANN ARBOR SAVINGS BANK.

Practice in supreme court: Discretion: Practice questions. The refusal of the court to grant a motion for leave to make such an amendment will not be reviewed on error, although the ground of the refusal was the mistaken one of a lack of power; a review in an appellate tribunal of such practice questions is objectionable upon grounds of general utility and practical necessity; but further than that the real subject of complaint is the final result and not the reason which led to it, and a correct ruling will not be reversed because it was based upon a wrong reason.

Heard January 15. Decided April 15.

Plaintiff in error moved to strike the case from the docket as improperly noticed for hearing for the reason that it was not in a condition to be noticed.

The bill of exceptions was removed from the files for amendment by order of the court by consent at the October term; and the amendments were not completed and the bill of exceptions had not been returned when the notice of hearing was served.

Lawrence & Frazer, for the motion.

C. D. Coleman, contra.

THE COURT held that the case was still in this court notwithstanding the removal of the bill of exceptions for amendment, and was subject to be noticed for hearing.

Motion denied, with costs.

Error to Washtenaw Circuit.

The sixth, seventh, eighth, and ninth assignments of error referred to in the opinion were as follows:

"6. The said circuit court erred in each of its rulings and decisions shown by the bill of exceptions in this cause, rejecting each matter of evidence which was offered to be proved on the part of said Polhemus, and rejected by said circuit court, to which exception was taken on the part of said Polhemus, as shown by the said bill of exceptions, assigning error on each of said rulings and decisions separately.

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"7. The said circuit court erred in each of its rulings and decisions overruling each of the objections made on the part of said Polhemus to the reception of evidence offered on the part of said bank, which was received in evidence and excepted to on the part of said Polhemus, as shown by said bill of exceptions.

"8. The said circuit court erred in each of its decisions excepted to as shown by said bill of exceptions.

"9. The said circuit court erred in giving the judgment shown by the record in this cause."

Lawrence & Frazer and *H. J. Beakes*, for plaintiff in error.

C. D. Coleman, for defendant in error.

GRAVES, J.

This is a writ of error to the circuit court for the county of Washtenaw.

The bank sued the plaintiff in error in assumpsit, and the declaration by which the suit was commenced counted specially on a note alleged to be of the following tenor:

"CANTON, March 4, 1870.

"Eighteen months after date, I promise to pay to the order of Ja. A. Saxton, in Ex. on New York, thirty-two hundred twenty-three dollars, at Miller & Webster's Bank, Ann Arbor, Michigan, with 7 per cent. interest from Feb. 18, 1870.

"J. A. POLHEMUS."

Endorsed, "JA. A. SAXTON."

The money counts were also added, together with a copy of the note and endorsement.

The declaration was filed in December, 1871, and on the 22d of January following the plaintiff in error pleaded the general issue, accompanied by a notice that he would defend upon several grounds none of which, however, indicated that the note set up was not genuine, and no affidavit was

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made on the subject. In July, 1872, the cause was tried on these pleadings, by the court without a jury, and judgment was given in general form in favor of the bank.

Several errors are assigned, but the sixth, seventh, eighth and ninth are clearly insufficient under the rule requiring assignments of error to be special, and the observations of my brother Cooley in *Altman v. Wheeler, 18 Mich., 240,* are so strictly applicable as to make further comment unnecessary. We may add, however, that on an inspection of the record we fail to discover satisfactory ground for any objection apparently hinted at by these assignments.

The fourth assignment maintains that the "court erred in refusing to permit the said Polhemus to inquire into the consideration of said note and to contest said note in respect to the consideration thereof." Without pausing to criticise the form of this assignment in its bearing upon the return to the writ of error, it is sufficient to say that the defense shadowed forth in the record was not available against the bank. No right to such defense existed if the bank became the holder of the note in good faith and for value, and the evidence upon this point was not only direct and clear in favor of the bank, but unopposed, so far as we discover, by any thing proved or offered of a contrary tendency. The court sitting without a jury and bound to pass upon the facts as well as the law, ruled that the bank became the holder in good faith and for value, and excluded the defense. We see nothing to impugn the correctness of this action of the court.

Whether we should be authorized to re-examine a decision of this character, made during the trial by the court when exercising the functions of both court and jury, and deciding the facts as well as the law, if the evidence relating to the point should be seen to have been *conflicting,* is a question we have no occasion to consider, and do not determine.

The plaintiff in error further complains because he was not allowed to show that the note, as described in the

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declaration and as produced in evidence, was not as he executed it.

The record effectually answers this objection. The case was being tried without any affidavit questioning the genuineness or identity of the instrument. As a consequence it stood admitted by the record that the note was given substantially in the form specified in the declaration, and this admission the plaintiff in error was not at liberty to contradict. A material variance between the contract as pleaded and as shown in the evidence would of course have raised a point available to him.

The objections which seem to be chiefly relied on relate to and grow out of the action of the court upon an application by the plaintiff in error for leave to amend by putting in an affidavit denying the execution of the note.

The return to the writ of error embraces a bill of exceptions, and we also find included, this motion, the affidavits and exhibits connected with it, and the decision of the court in denying it. These proceedings are also embodied in the bill of exceptions. The motion appears to have been made some four months after the plea, and to have been decided about six weeks after it was made. In passing upon it the court declared that it had no power to grant it, and therefore refused it without considering the merits, and the plaintiff in error excepted.

We think the court misapprehended the meaning of the rule in supposing a lack of power to grant or refuse the motion according to its view of the real merits of the application. The rule as framed was intended to leave a discretionary authority to be exercised as the justice of particular cases should require, so that parties could be let in after pleading, upon good cause. The motion, then, was really an appeal to the discretionary power of the court below, and might have been granted or denied upon the merits in the exercise of that power. If the court had acted upon that view, if it had denied the motion upon the merits, instead of doing so upon the ground that it lacked power to grant it, then

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according to the established course in this state and that generally prevailing elsewhere, the ruling could not have been reviewed upon writ of error. Can the ground on which the court placed the denial of the motion, be so separated from the denial itself as to present a case entitled to review on writ of error when otherwise none would exist?

We think not. In the first place it may be observed that if the motion itself and the decision made upon it are regularly before us as constituents of the record, the affidavits and exhibits connected with it are necessarily before us also; and we are therefore in a situation to ascertain what it would be our duty to ascertain, whether the court in denying the motion upon the mistaken ground of a lack of power in the abstract to grant it, committed a fault which in legal contemplation was prejudicial to the plaintiff in error. Now these papers cannot be read without seeing that the fate of the motion must have been just the same if the court had decided on the merits. The plaintiff in error was consequently not prejudiced by the erroneous reason given for the denial of his motion. But we think the ruling upon the motion, on whatever ground placed, is not one properly open to review upon writ of error.

The rules devised for judicial investigations are undoubtedly aimed to promote the ends of justice, but they are necessarily subject to those infirmities which beset all human regulations. They cannot be so nicely contrived or so multiplied as to meet all necessities, or to operate always according to the exact purpose of their institution. A perfect system would supply a definite and unmistakable rule in advance, applicable to every contingency, and would leave nothing to discretionary action. But every day's experience teaches that such degree of perfection is unattainable. We know that the litigation carried on in courts involves a class of questions not amenable to any unbending pre-ordained rule, and that many, if not most of these questions, could not be specifically or definitely provided for beforehand by absolute regulations without making our

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system so cumbrous and complicated as to be incapable of being carried out. These matters must, therefore, be settled as they arise, by the tribunal in which they occur, according to the dictates of sound judicial discretion. The law, upon grounds of public policy and general utility, commonly allows a re-examination of such matters in some form and at some stage in the *same* tribunal, but on the same grounds, generally *disallows* a revision elsewhere. The welfare of society requires, of course, that there should be given reasonable opportunity for the hearing and decision of questions. But it likewise requires that limits should be set to litigation, and of this the law has taken clear notice in one of its settled maxims, and in many other ways.

It has also taken notice that there are questions which cannot be made the subject of review in an appellate court without derogating from the independence and authority due to the tribunal where they arise; and others still, which from their nature cannot be intelligently and safely re-examined except in the court where they originate.

But in addition to these, there has always been a mass of practice questions which the law, upon grounds of general utility and practical necessity, has considered as not properly appealable to another tribunal. It has been wisely deemed that permission to litigants to carry cases up for review upon each and every of the points ruled in matters of practice and routine, would well nigh make litigation endless, and instead of favoring justice would promote injustice. Passing from these general and somewhat trite observations to the actual case before us, we observe that the true subject of complaint by the plaintiff in error on this record, is the *final result* of his motion and not the peculiar view of the court which led to it.—*McCluny v. Silliman, 6 Wheat., 598; United States v. Buford, 3 Pet., 12; Davis v. Packard, 6 Pet., 41; Corning v. Troy Iron & Nail Factory, 15 How., 451; Sturgis v. Clough, 1 Wall., 269.*

If the motion had been granted in disregard of the

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merits, on the mistaken supposition that some rule imperatively required it to be granted on being asked for, no one would imagine that the erroneous reason could be distinguished from the actual determination so as to serve as a distinct ground of error for the plaintiff in error, and if a wrong reason for a favorable decision could not be thus separated and distinguished from the actual result, it is not perceived how a wrong reason for an unfavorable one can be.

The objection, then, must be considered as founded on the refusal of the motion, and not on the motive which led to that refusal, and considered in that light it seems manifest, according to the uniform course of decision, that the proceeding was one belonging to the practice and discretionary authority of the court below, not regularly re-examinable on writ of error, and certainly not when not shown to have been decided in clear opposition to the merits.—*Detroit v. Jackson, 1 Doug., 106; Millerd v. Reeves, 1 Mich., 107; Lee v. Hardgrave, 3 Mich., 77; Bourke v. James, 4 Mich., 336; Holbrook v. Cook, 5 Mich., 225; Chaffee v. Soldan, ib. 242; Crippen v. People, 8 Mich., 117; Tefft v. McNoah, 9 Mich., 201; Ripley v. Davis, 15 Mich., 75; Pearsons v. Eaton, 18 Mich., 79; Final v. Backus, ib. 218; 2 Abbott's U. S. Prac., 230, and notes.*

If the granting or refusing of an interlocutory motion can be so worked into the record as to authorize error to be assigned on it, by a mere statement in the decision like that made by the court below in this instance, then the common-law composition of the record and the generally admitted scope of a writ of error can be entirely changed by what in time will become a mere form, and the whole swarm of rulings upon pure practice questions and on points rightly and strictly depending on mere judicial discretion will be brought here for review. But we are satisfied that no such jurisdiction is conferred or ought to be.

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This disposes of all the assignments of error, and, as a consequence, of the case.

The judgment should be affirmed, with costs.

CAMPBELL, J., and CHRISTIANCY, CH. J., concurred.

COOLEY, J., did not sit in this case.

Bradley S. McCabe v. George Farnsworth and others.

Practice in supreme court: Cross appeal. Where a party in whose favor decree in the circuit is granted, wishes the decree modified in his favor, he must appeal notwithstanding the other party has appealed.

Appeal in chancery: Parties. A mortgagor against whom a decree in a foreclosure suit has been taken, making him personally liable for any balance, is not precluded from contesting the validity of the decree upon the merits on an appeal, by the fact that he has parted with his title to the mortgaged premises to one who has allowed the decree to be taken by default and failed to appeal.

Defendants against whom a decree for costs has been taken, may appeal from the decree.

Mortgages: Estoppel. Where a mortgagee, after having assigned the mortgage to his father, has dealt with the mortgagor and his grantees on the basis that he still held the mortgage, and the father has failed to give notice of the assignment and so conducted himself as to authorize them to believe that the son was the real owner of the mortgage, the father is estopped from denying the right or authority of the son, whether the money for which the mortgage was originally given was his or not.

Mortgages: Payment. The mortgagor and his grantees having deeded the mortgaged premises and other property to the mortgagee and others, in consideration of the mortgage debt and other debts, and taken back a contract to reconvey on certain conditions specified, the mortgage debt was held to be thereby satisfied and extinguished.

Mortgages: Satisfaction: Revival: New agreement: Abandonment. The mortgage debt having been thus paid and extinguished, it could only be revived as a lien on the property by, either a mutual rescission of the deed and contract, which would imply a reconveyance, so as to put all parties in *statu quo*, or a new subsequent agreement founded upon a new and sufficient consideration; and an abandonment of the contract merely, could not have that effect.

Mortgages: Extinguishment: Revival: Subsequent agreement. And if the mortgage debt were thus revived by a new and subsequent agreement, the obligation to pay and the lien would rest, not upon the old mortgage and note, but upon such new agreement, which would alone constitute the basis of the right to enforce payment or to foreclose.

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McCabe v. Farnsworth.

Equity pleading and practice: Evidence. In any suit, therefore, either to enforce payment or to foreclose the lien, such new agreement, being the foundation of the right of action, must be pleaded: and evidence of such an agreement would not be competent under a foreclosure bill setting up and relying upon the original note and mortgage only.

Defendants to a foreclosure bill, by allowing the bill to be taken as confessed, admit nothing more than the case made by the bill, and not any new agreement relied upon, which appears in the proof only; and a defense made by those who answered, showing affirmatively the extinguishment of the mortgage constituting the only ground of relief set up in the bill, enures equally to the benefit of all the defendants.

Evidence of subsequent dealings between the mortgagee and those to whom, jointly with him, the mortgagor had conveyed the mortgaged premises in satisfaction of the mortgage debt, in reference to reviving the lien, is held incompetent under the bill in this case.

Heard January 15. Decided April 15.

Appeal in Chancery from Mason Circuit.

R. W. Duncan and *N. J. Emmons*, for complainant.

Eben C. Smith and *E. Mariner*, for defendants.

The defendants appealed from the decree, which was in favor of complainant; but the complainant being dissatisfied as to the rate of interest allowed by the decree, also appealed. During the argument the question was raised whether such cross appeal was necessary.

The Court held that when a party in whose favor a decree is granted, wishes the decree modified in his favor, he must appeal, notwithstanding the other party has appealed.

Christiancy, Ch. J.

This was a bill filed in Mason county, March, 1863, to foreclose a mortgage dated September 26, 1848, executed in Wisconsin by the defendant, George Farnsworth, then of Racine, Wisconsin, to Harry R. Talmage of Milwaukee, upon a tract of land situated in Mason county, Michigan, including a saw-mill and other buildings thereon, to secure the

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payment of a promissory note of one thousand five hundred dollars, executed by Farnsworth, payable to the order of said Harry R. Talmage at the city of Milwaukee on the first day of November, 1849. The mortgage was duly recorded October 24, 1848.

The bill alleges that the note and mortgage, though executed to Harry R. Talmage of Milwaukee, were given for the purpose of securing a then existing indebtedness of Farnsworth to Harry Talmage of Greenville, Greene county, New York, who by the evidence appears to have been the father of said Harry R., which indebtedness is alleged to have accrued by way of money loaned to Farnsworth by said Harry Talmage; and that the note and mortgage were given for the sole use and benefit of said Harry Talmage; that on the 10th day of June, 1849, said Harry R. duly assigned and delivered said mortgage and note to said Harry by an assignment in writing which was afterwards, January 23, 1856, duly recorded; that said Harry Talmage, while being the owner of said note and mortgage, died in the forepart of the year 1855, intestate, and in the same year administrators (naming them) were duly appointed upon his estate, by the county judge of the county of Greene; that, as such administrators, they on the 10th day of November, 1862, at Greenville aforesaid, in consideration of four thousand and forty-two dollars, paid to them by the complainant, sold, assigned, and transferred said note and mortgage to him, together with the debt thereby secured, by an assignment duly executed and acknowledged; alleges that the sum due at the filing of the bill is the whole principal sum of one thousand five hundred dollars, with interest at the rate of twelve per cent. per annum, from the date of the mortgage.

The other defendants (except Farnsworth) are made parties only by the general allegations that they "have or claim to have some interest in said mortgaged premises or in some part thereof as purchasers, mortgagees, or otherwise."

In all other respects the bill is in the ordinary form of

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a foreclosure bill, praying the usual decree for the payment of the amount due, or sale and foreclosure.

James Ludington alone answers the bill; but by stipulation the defendants, Farnsworth, John M. Loomis, H. Sidney Hayden, and George Ludington, against whom a *pro confesso* had been entered, were allowed to appear, and the answer of James Ludington allowed to stand also as their answer.

This answer admits the execution of the note and mortgage by Farnsworth to Harry R. Talmage, but denies that they were executed to secure any indebtedness of Farnsworth to said Harry Talmage, or for his sole use as alleged in the bill, and alleges upon information and belief, that the indebtedness, if any, for which the note and mortgage were given, was from Farnsworth to said Harry R.; states that defendants are ignorant whether the note and mortgage were assigned by said Harry R. to said Harry, or whether, if any, it was recorded; but avers that if such assignment was made, it was made secretly and kept concealed from the said Farnsworth, who never had any notice thereof; that defendants are ignorant whether said Harry died intestate, or whether administrators were appointed, or whether they sold and assigned the note and mortgage to complainant as alleged; but denies that said Harry Talmage, in 1855, owned the mortgage or had any interest in it; denies that there is due upon the note and mortgage fifteen hundred dollars and interest, or any other sum; alleges that these defendants are the owners in fee of the premises.

The answer then avers that on or about the 15th day of October, 1850, said Farnsworth and Merritt B. Atwater conveyed to said Harry R., then the owner and holder of said note and mortgage, and to Harry S. Durand and Israel Munson Hill the said mortgaged premises, together with a large amount of lands adjacent, in full satisfaction of said note and mortgage; and that said Harry R. then and there agreed to take and receive said conveyance as a full

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and complete satisfaction and payment of the debt secured by said mortgage, among other debts, and agreed to satisfy and discharge the same, and did so take and receive the same in payment and satisfaction, and that said mortgage became thereby extinguished.

The other defendants, George W. Ford, Charles Mears, and John Baldwin, Jr., failing to appear and answer, the bill as to them was taken as confessed.

The case was heard in the court below upon the pleadings and proofs, and a decree in the usual form of foreclosure and sale granted against all the defendants, with costs, including a personal decree against Farnsworth for any balance which might remain due after the sale. From this decree the defendants, James Ludington, George Farnsworth, John M. Loomis, H. Sidney Hayden, and George Ludington have appealed.

With the exception of the general allegation that the defendants who answer are the owners in fee, there is nothing in any of the pleadings showing any interest of any of the defendants, except Farnsworth, in the mortgaged premises, or in the controversy.

The proofs show no such interest in any of the defendants (whether answering or not) except Farnsworth, the mortgagor, and George W. Ford, to whom the fee or equity of redemption of five-sixths of the mortgaged premises is traced, nor does any reason whatever appear why any of the other defendants were made parties.

It appears from the evidence that one-third of the mortgaged premises, after the execution of the mortgage, was conveyed by Farnsworth to Merritt R. Atwater and Ira Atwater; that Farnsworth, still owning one-third, and Merritt B. Atwater, one-sixth, conveyed by warranty deed (purporting to convey the whole) to Harry R. Talmage and to Harry S. Durand and Israel M. Hill (who seem to have been partners, known as Durand & Hill), taking back an agreement,—which deed and agreement will be more fully noticed hereafter. But Ira Atwater having died in the

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meantime, his one-sixth of the mortgaged premises vested in his heirs, who did not convey, and in whom that interest still remains, so far as appears from the evidence. Harry R. Talmage afterwards conveyed his interest thus acquired, to Durand & Hill; and they afterwards conveyed to defendant, George W. Ford. Merritt B. Atwater also, about the same time, and Farnsworth the next year, quit-claimed to Ford all their respective interests, which, if any thing, consisted of their equities growing out of the contract of Harry R. Talmage and Durand and Hill. In this manner five-sixths of the fee or equity of redemption vested in Ford, leaving one-sixth outstanding in the heirs of Ira Atwater, who are not made parties, unless they are included among the defendants whose interests do not appear. No objection, however, is taken for want of parties, and if those heirs are not among the defendants, they will not be bound by any decree in the case.

A preliminary objection is taken by the counsel for the complainant that, as the equity of redemption is traced to Ford, and no interest of any of the other parties is shown to be affected by the decree, and he has allowed the bill to be taken as confessed, and has not appealed, the appeal ought to be dismissed, or at least, that the decree ought not to be disturbed at the instance of parties who show no interest affected by it. Doubtless such a decree of foreclosure might have been made as would have given great force to such an objection. But this decree is not merely for foreclosure of the mortgage and sale of the mortgaged premises; it makes Farnsworth, the mortgagor, personally liable for any balance of the mortgage debt and costs after the proceeds of sale have been applied, and awards execution therefor. He is, therefore, clearly entitled to contest the validity of the decree upon the merits. The decree also awards costs against all the defendants, and they are, therefore, interested in its reversal.

We must, then, examine the case upon its merits.

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The complainant proved the assignment by Harry R. Talmage, of the note and mortgage, to Harry Talmage, June 10, 1849, the death of said Harry R., intestate, the appointment of administrators, and the assignment of the note and mortgage by them to complainant, at the respective dates stated in the bill.

The first and most important question upon the merits is, whether the conveyance made by Farnsworth, the mortgagor, and Meritt B. Atwater, to Harry R. Talmage, Harry S. Durand and Israel M. Hill, October 16, 1850, and the agreement of that date executed by the grantees to Farnsworth and Atwater, operate as a payment or extinguishment of the note and mortgage.

Farnsworth and Atwater were then, and had for some time been, engaged in carrying on the saw-mill upon the mortgaged premises, and in the lumber business connected with it, and much embarrassed with debts. They owed Durand & Hill (who seem to have been partners in business) a debt of some four thousand or five thousand dollars, and to Harry R. Talmage another debt, which, according to the testimony on the part of the complainant, amounted to one thousand dollars, and, according to that on the part of the defense, from five hundred to six hundred dollars, and Farnsworth owed this mortgage of one thousand five hundred dollars, with interest at twelve per cent. from its date, which was a lien upon the real estate conveyed by him and Atwater. And, though the money for which this note and mortgage were given may have been the money of Harry Talmage, the father, and the note and mortgage had been assigned by Harry R. to the father in 1849, yet these were, by the father's request and procurement, made directly to, and in the name of, Harry R., the son, under circumstances which fully justified Farnsworth in believing, and we are satisfied he did believe, that the money for which they were given was that of Harry R., and that he was in reality and in good faith the owner of them; and, though there is a slight conflict of evidence upon the point,

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we are entirely satisfied that this was the belief of Farnsworth and Atwater, as well as of Durand & Hill, at the time of this conveyance and agreement; and that neither Farnsworth, nor Atwater, nor Durand & Hill, had any notice of the assignment of the note and mortgage to Harry Talmage, the father. It was under these circumstances, with the several debts of Farnsworth and Atwater to Durand & Hill and to Harry R. Talmage, and this mortgage of Farnsworth to Harry R., which all the parties, except Harry R., at least, believed, and were authorized to believe, belonged to Harry R., that the conveyance of October 16th, 1850, and the accompanying agreement of that date, were made.

The deed is an ordinary warranty deed, purporting to convey the whole of the mortgaged premises, which contained two hundred and twenty-eight and sixty one-hundredths acres, with the mill and other buildings thereon, and *also three hundred and sixty-one and fifty-one one-hundredths acres of other lands in the same township (pine lands) not covered by the mortgage*, and which do not appear to have been incumbered. And, though the deed recites a consideration of nine thousand dollars, all the testimony agrees that no consideration was given except the above mentioned indebtedness, whether including the mortgage or not, and all except that of Harry R. agrees that the mortgage was a part of this consideration, and even Harry R. himself says that Durand, who made the figures at the time, he presumes figured this in as a part of the indebtedness for which the deed was given, and understood it to be included; and the testimony is overwhelming and conclusive upon this point, and shows clearly that Farnsworth and Atwater and Durand & Hill so understood, and that Harry R. must have known they so understood it, and we are satisfied it was so treated afterwards between Harry R. and Durand & Hill in determining their respective interests in the property and the business of carrying on the mill and lumber business in accordance

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with the agreement they had given Farnsworth and Atwater. And whatever interest Harry Talmage may have had, as between him and his son, his conduct in taking the mortgage in his son's name, and all his acts in reference to it, especially his neglect to give notice of its assignment, had been such as fully to authorize, not only Farnsworth, but Atwater and Durand & Hill, to treat his son as the real owner of the mortgage, and to deal with him as such; and for the purpose of determining the objects and effects of the conveyance and agreement in question, we must also treat him as the owner, and consider the several matters of indebtedness mentioned, including the mortgage debt, as the consideration of the deed.

Such being the consideration for the conveyance, had there been no accompanying agreement, we must, in the absence of any agreement showing a contrary intent, necessarily infer that the conveyance was taken in payment of the debts which constituted the consideration; since, if not taken as collateral to the debts, those debts could not be the consideration given by the grantees, and remain at the same time so much outstanding indebtedness.

The agreement itself is in the following words: "Whereas, Messrs. Farnsworth and Atwater, of Pere Marquette, Mason county, Michigan, have this day conveyed to us, the undersigned, certain real and personal estate situate at Pere Marquette aforesaid, and more particularly described in the deed of conveyance and the bill of sale; now it is understood between the parties that the said property has been conveyed to us *for a valuable consideration in the shape of a prior indebtedness by said Farnsworth and Atwater to us*, and it is further understood that we are to use, occupy and improve said property to the best advantage that our judgment may dictate, and dispose of all lumber or other commodities that may be produced therefrom, and keep an accurate account of all expenses and disbursements, together with all receipts and income therefrom. And it is further understood and agreed that whenever the net proceeds

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arising from the said property shall amount to a sufficient sum to fully reimburse us for all claims and demands which we now hold against said Farnsworth and Atwater, with interest at twelve per cent., for which the said conveyance was made, and we shall also be paid therefrom a fair and reasonable compensation for all advances, either in money or otherwise, and for such services as we may render, or obligations which we may assume, and be fully indemnified for all and all manner of debts or other liabilities which we may incur in the management of said property and the business connected therewith; we are then, at any time when desired by said Farnsworth and Atwater, to redeed and reconvey the real estate, which we may not but by their consent, or with their request, sooner dispose of, and also the personal property that has not been used or disposed of in the conducting said business or sold for the mutual benefit of the parties.

"*And it is further understood that all debts or demands which may be due us or either of us from George Farnsworth or Merritt B. Atwater, are to be included in this obligation and to be paid before re-conveyance.* And it is further agreed that at any time when said real and personal property can be sold at good advantage, it may, with the consent of the parties interested, be sold, and any balance then due us and remaining unpaid is to be retained from the proceeds of said sale, and the remainder paid over to said Farnsworth and Atwater.

"Dated at Racine, Wis., Oct. 16, 1850."

(Signed) "DURAND & HILL,
H. R. TALMAGE."

It is manifest from this agreement that the conveyance of the property was not taken merely as a collateral security for the indebtedness, and at the risk of the grantors, that its use, or its use and sale, should pay the debt; but that the grantees assumed and undertook at their own risk to make that indebtedness out of the use of the property and business which they contracted to carry on in connec-

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tion with it—or at most, out of such use and the proceeds of such sales of the property as Farnsworth and Atwater should be willing to assent to; but that they, Talmage, Durand & Hill, were not to be bound to reconvey until the proceeds of the use of the property and business—or, at most, these proceeds and the proceeds of the sale of a part of the property itself, to be made with the assent of Farnsworth and Atwater, should be sufficient to pay (and indemnify them for) all the indebtedness alluded to, together with a reasonable compensation for all their advances, and such services as they might render, and obligations as they might assume in the management of the property and business. In legal effect, the property was received in payment, with an undertaking on the part of the grantees to reconvey on the condition mentioned.

It is also clear, taking the deed and agreement together, that Talmage, Durand & Hill acquired thereby the absolute right to carry on the business and to use the property in the manner and for the purposes specified, and that Farnsworth and Atwater had no right, even by tendering the money for the full amount of such debts, the next day or at any subsequent time, to demand a reconveyance. We must, therefore, consider the effect of the contract, construing its language with reference to the conveyance and the subject matter, as a satisfaction and extinguishment of all the indebtedness (including the mortgage), in consideration of which the conveyance was made. And, though the note and mortgage were not delivered up, nor the mortgage released of record, they were no longer of any force or importance between the parties, except as they constituted to that extent a measurement of the amount to be realized by Talmage and Durand & Hill from the use and income of the property and business contemplated, or from these and the proceeds of such sales of part of the property, before they should be bound to reconvey.

The mortgage and note being thus in legal effect paid and extinguished, as between the mortgagee on the one side

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and Farnsworth (the mortgagor) and Atwater and Durand & Hill on the other, could only be revived as a debt or as a lien upon the property, in one of two ways: *First*, by a mutual rescission of the whole arrangement, including the deed and contract, which would imply a reconveyance of the property to Farnsworth and Atwater, so as to place them in *statu quo;* or, *second*, by a new subsequent agreement founded upon a new and sufficient consideration, for it is idle to talk of an abandonment of the contract under such circumstances.

Now, it is not pretended or claimed that there was any reconveyance or any such rescission of the contract or arrangement made by the deed and the accompanying agreement, as to place the parties in *statu quo*. The only mode, therefore, in which the mortgage debt could be revived or the mortgage could become a lien upon the land as to any one, was by a new contract, based upon such new consideration as would be sufficient to sustain it as a new mortgage then given. And though such new contract should be express to pay the old note and mortgage, the obligation thus to pay and the lien upon the land would not rest upon the old note and mortgage, but would be one *created by*, and *resting upon*, the *new contract* so made; and this would constitute the basis of the right to enforce payment or foreclosure. And, therefore, whether operating as an agreement or covenant to pay, or merely by way of estoppel against denying the existence and force of the note and mortgage, it would equally, in an action at law to recover the money, or a bill to foreclose, upon all just principles of pleading, be made, by the declaration or the bill, the foundation of the plaintiff's or complainant's right.

If, therefore, the complainant relied upon any such new agreement or contract, he should have set it up in his bill, and based his right to the relief he asked upon it, so as to allow the defendants to answer it and take issue upon it.

Under a bill which only set up and relied upon the note and mortgage, the defendants had no reason to antici-

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pate the proof of a new and separate agreement as the basis of complainant's rights, and which alone, instead of the note and mortgage, created the obligation he was seeking to enforce.

And, as the mortgage and note, constituting the only ground of claim or relief set up in the bill, are shown to have been paid and extinguished, the whole case made by the bill is met and defeated, as to all the defendants who have answered, and, as to those who did not answer, knowing the mortgage debt was thus paid, and that the mortgagors and others had answered and set up the payment, they had a right to rely upon the defense thus made. By allowing the bill to be taken as confessed against them, they admit nothing more than the case made by the bill, and not any new agreement set up and relied upon in the proof only.

And this admission is rendered of no avail by the defense made by Farnsworth, the mortgagor, showing affirmatively the extinguishment of the mortgage. This defense enures equally to the benefit of all parties deriving an interest in the premises, immediately or remotely, through the mortgagor, after the date of the mortgage, though they may have allowed the bill to be taken as confessed and have not appealed. The case did not warrant a decree against any of the parties under the present bill.—See *Buchoz v. Lecour, 9 Mich., 234.*

The complainant, under objection from the defendants, introduced evidence for the purpose of showing that when Harry R. Talmage conveyed to Durand & Hill, he reserved the mortgage and the right to foreclose the same, and extended the time one year, and that they assented to the same, and that after Durand & Hill had conveyed to Ford, the latter agreed in writing to pay the interest on the first of May, 1852, and to buy and pay for the mortgage in one year. He also introduced evidence tending to show that Farnsworth knew of, and assented to, the conveyance to Durand & Hill, though Farnsworth testifies that

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he knew nothing of the sale except from hearsay, and did not consent to the reservation by Talmage of the mortgage, and there does not appear to be any satisfactory evidence that he did. There was also evidence tending to show that Farnsworth assented to the sale of Durand & Hill to Ford, though not to show that he knew of, or assented to, Ford's agreement with Talmage in reference to the mortgage. And it was also shown that both Farnsworth and Atwater separately quit-claimed to Ford, after his purchase from Durand & Hill, and that Farnsworth received from Ford from three hundred to six hundred dollars as a consideration for his quit-claim.

But we do not enter upon the consideration of any of this evidence, so far as it bears upon the question, whether there was or was not a contract or agreement by Durand & Hill, or Ford, or Farnsworth, or Atwater, to revive the mortgage, or to create a personal liability of any of the parties to pay it. Proof of any such agreement was objected to, and was clearly inadmissible under the pleadings.

The decree of the circuit court in chancery must be reversed and the bill dismissed, with costs in both courts.

The other Justices concurred.

Silas C. Overpack v. Charles F. Ruggles.

Certiorari: Practice in circuit courts. On *certiorari* to review a judgment of a justice of the peace, the circuit court cannot weigh the evidence; and it is error in such a case, where the testimony was conflicting, to allow a reduction by way of recoupment rejected by the justice upon the facts and without refusing to receive any evidence.

Justice's courts: Taxation of costs: Statute construed. The statute (*Comp. L. 1871, § 5815*) in relation to taxable costs in justice's courts, was intended merely to prevent the accumulation of needless costs, and to limit the party as to such

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as are within his control; the jury fees, court fees, and officers' fees for serving any process other than subpœnas, are meant to be excepted from the limitation, and are taxable.

Heard April 8. Decided April 15.

Error to Manistee Circuit.

S. W. Fowler, for plaintiff in error.

Ramsdell & Benedict, for defendant in error.

CAMPBELL, J.

This cause was removed by *certiorari* from a justice's court to the circuit court for the county of Manistee, and a judgment in favor of plaintiff was reduced in amount at the circuit, by allowing a reduction which the justice had rejected. A question also arose as to the legality of certain costs.

The suit was on a contract to recover for iron work furnished to defendant, who pleaded set-off and recoupment. The plaintiff testified that the defendant was to furnish and deliver the iron to be worked up, and failed to do so, so that plaintiff furnished his own. He also testified that the work was not to interfere with his general work. The defense was that there was delay whereby defendant was put to extra expense about the building for which the work was to be done, and that plaintiff made repeated promises and failed to keep them. Defendant's version of the agreement was not the same as plaintiff's.

The justice returned that he did not refuse to receive evidence by way of recoupment, but that upon the facts, which were conflicting, he found for the plaintiff.

The circuit court could only reduce the judgment by weighing the testimony, and crediting that which the justice did not credit. This the court had no authority to do, and the reduction was improper.

The costs objected to were court and officers' fees, which it is claimed could not properly be taxed under *section*

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5375 of the Compiled Laws of 1871, where it is provided, "That the taxable *costs of the prevailing party* shall not exceed six dollars in all suits upon contract, and shall not exceed ten dollars in all other cases; *and the costs of the prevailing party* shall not be deemed to include jury fees, court fees, or officers' fees for serving any process, except subpœnas for witnesses." The same section requires the party to show positively that the expenditures for which he charges were necessary. Both of these conditions and qualifications are recent amendments of the old law.

It is plain, from the tenor of the whole section, that the object of the statute is merely to prevent the accumulation of needless costs, and to limit the party as to such as are within his control. The only vexatious costs likely to be incurred would be for the attendance of witnesses, and would include witness fees and service of subpœnas. The fees of the court or jury, and for service of other process, would be the same, or nearly the same, in all cases, and would be unavoidable and absolutely necessary. If we should hold these fees not to be taxable, it would follow that the plaintiff must in all cases pay those costs out of his own pocket, while he could recover costs which were to some extent within his own discretion. This is not, we think, the natural meaning of the statute. When it says that the "*costs of the prevailing party*" shall not exceed six dollars, and that the "*costs of the prevailing party*" shall not be deemed to include court and jury fees, etc., it is equivalent to saying that these are excepted from the limitation, and not that they are not to be taxed. If the latter clause had not been an amendment by way of addition to the former, the whole would probably have been put in a neater form. But the idea is expressed so that there can be no doubt as to its meaning.

We think the costs taxed were lawful.

The judgment of the circuit court must be reversed, and that of the justice affirmed, with costs of all the courts.

The other Justices concurred.

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The People on the relation of Randolph Strickland v. Moses Bartow.

Liquor law: Penalty: Civil action: Imprisonment of females: Statutes construed. The action of debt provided for by the prohibitory liquor law (*Comp. L. 1871*, § *2141*) is in the nature of a civil action, and not a criminal prosecution; and the statute (*Comp. L. 1871*, § *6119*) prohibiting the imprisonment of females on "any process in any civil action" applies to a *capias* issued under that section, whether the act for which the penalty is given constitutes a misdemeanor and is punishable as such or not.

Statutes construed: Repeal: Imprisonment of females: State policy. The statute (*Comp. L. 1871*, § *6119*) prohibiting the imprisonment of females in a civil action is not repealed by section 10 of the prohibitory liquor law (*Comp. L. 1871*, § *2143*): this statute was intended to declare the settled policy of the state in this regard, and all later statutes giving the right generally to commence suits by *capias*, or to imprison a defendant, are to be construed in reference to this policy.

Circuit court commissioner: Holding to bail: Imprisonment of females. A circuit court commissioner, therefore, has no authority to make an order to hold a female to bail upon a *capias* issued under the penal section of the prohibitory liquor law (*Comp. L. 1871*, § *2141*).

Heard April 8. Decided April 18.

Application for *mandamus*.

R. Strickland, in person, for the relator.

M. Bartow, in person, for the respondent.

CHRISTIANCY, CH. J.

This was an application for a *mandamus* to compel the respondent, a circuit court commissioner for the county of Clinton, to make an order to hold Ann E. Shireling to bail upon a *capias* issued against her from the circuit court for that county, at the suit of the people in an action of debt, to recover a penalty for selling intoxicating liquors in violation of section three of an act entitled, "An act to prevent the manufacture and sale of intoxicating liquors as a beverage" (*Comp. L. 1871*, § *2138*). The commissioner refused to make the order, on the ground that said Ann E. Shireling, being a female, could not be imprisoned on any process in a civil action; for which he relies upon

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section 45 of chapter 192, Compiled Laws of 1871, entitled, "Judgments and Executions," which section is in these words: "No female shall be imprisoned on any process in any civil action." The relator, however, insists that this action, though it be an action of debt, and civil in form, yet, being for a penalty for an act which might be punished as a misdemeanor, under *section 6851, Compiled Laws of 1871*, if not under section three of this act, as amended in 1871; it is really and in substance a criminal prosecution.

We do not think it necessary to determine whether the act for which the penalty is given in the present case would constitute a misdemeanor, and might be prosecuted as such by indictment or information; since, admitting this to be so for the purposes of this case, we are still of the opinion that the action of debt provided for by section eight of the Liquor Law (*Comp. L. 1871, § 2141*), is to be treated as a civil action and that it takes the character and incidents of a civil suit and not of a criminal prosecution. We think, therefore, the case comes within the prohibition of the statute above cited, which declares that "No female shall be imprisoned on any process in any civil action."

But, it is insisted that, if such be the case, still this statute must be regard as repealed by section 10 of the Liquor Law (*Comp. L. 1871, § 2143*) above cited, which gives the right to commence a suit for the penalty, and provides for taking bail, without making any exception of female defendants.

But we do not think the legislature intended by this general provision, to repeal the statute in question, and to subject females to imprisonment in this or other civil action. This provision against the imprisonment of females on process in civil action is found in the *Revised Statutes of 1838, Part 3, Title 2, ch. 7, § 44*, and was put in its present form in the *Revised Statutes of 1846, ch. 106, § 45*. In both revisions it is found in the chapter entitled, "Judgments and Executions," and was intended, we think, to declare the settled policy of the state in this respect. And

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all later acts giving the right generally to commence suits by *capias*, or to imprison a defendant, must be understood to have been enacted with reference to this policy, and, by implication, as intended to be subject to the exception or qualification declared by this statute, unless expressly or by necessary implication otherwise provided.

Such, we see no reason to doubt, was the intention of the legislature. We think, therefore, the commissioner was right in refusing his order for bail in this case; and the application for a *mandamus* must be denied, with costs against the relator.

The other Justices concurred.

Nathan L. S. Lenheim v. Barnabas M. Fay and another.

Promissory notes: Endorsement: Fraudulent representations: Statute of frauds. In an action against an endorser upon a promissory note, the fact that the endorsement was procured by means of false and fraudulent representations made by the plaintiff to the endorser, through the procurement of the maker of the note, as to the pecuniary responsibility of the latter, is a good defense; the statute of frauds (*Comp. L. 1871, § 4701*) requiring representations "concerning the character, conduct, credit, ability, trade, or dealings of any other person," to be in writing, etc., has no application to such a case.

Fraud: Endorsement: Bona fide purchaser: Notice. One who has been privy to, and a participant in, the fraudulent procurement of an endorsement has notice of the fraud, and cannot become a *bona fide* purchaser of the paper endorsed, so as to be entitled to recover upon the contract of endorsement.

Heard April 9. Decided April 15.

Error to Saginaw Circuit.

I. M. & H. P. Smith and *Gaylord & Hanchett*, for plaintiff in error.

Wisner & Draper, for defendants in error.

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LENHEIM v. FAY.

COOLEY, J.

Fay and Hollon brought suit against Lenheim upon his endorsement of a promissory note, made by Dwight G. Holland, for the payment of twenty-five hundred dollars to the order of Lenheim, and endorsed by the latter for the accommodation of the maker. The defense was that the endorsement was obtained by fraud, and that the plaintiffs were not holders in good faith.

The defendant's case was this: Holland came to him and requested him to endorse the note. He refused upon the ground that he doubted Holland's responsibility. Holland then said that the note was to be discounted by Joe A. Hollon, one of the plaintiffs, who knew all about his circumstances, and he referred defendant to said Joe A. Hollon for information regarding his responsibility. Defendant thereupon went to the banking-house of the plaintiffs, where he communicated to Joe A. Hollon the conversation he had had with Dwight G. Holland, and Joe A. Hollon then, with full knowledge that defendant had been sent to him by Dwight G. Holland for information to guide him in determining whether to endorse the note in question, gave him very strong assurances that Dwight G. Holland was responsible and was owner of a large amount of property over and above all his liabilites, influenced by which defendant returned and endorsed the note, and the same was then taken to, and discounted by, the plaintiffs. These assurances of Joe A. Hollon are claimed to have been wholly at variance with the facts; Dwight G. Holland being then, as Joe A. Hollon well knew, entirely irresponsible and insolvent, and having liabilities exceeding his assets by some twenty-five thousand dollars.

The circuit judge held these facts to constitute no defense to the suit, and directed verdict and judgment for the plaintiffs for the amount of the note. This conclusion is supposed to be justified by a section of our statute of frauds, being *section 5 of chap. 81 of the Revised Statutes of 1846* (*Comp. L. 1871*, § *4701*), which provides that, "No

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action shall be brought to charge any person upon, or by reason of, any favorable representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representations or assurances be made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." It is conceded that the representations of Joe A. Hollon were not in writing, and that the defense must fail if the case is within the statute.

It is presumed that the view taken by the circuit judge was substantially identical with that taken by the counsel for Fay and Hollon on the argument in this court. The statute, it is insisted, forbids any action being brought to charge Joe A. Hollon upon the representations made by him as above set forth. But if he cannot be charged in an action brought against him founded thereon, neither can the representations be made available as a defense to a suit brought by him, in such manner as to deprive him of a valuable right which he might otherwise enforce. To permit this would be to defeat the evident purpose of the statute. It would make its operation depend upon the unimportant circumstance that in the particular suit the party making the representations was plaintiff instead of defendant; if defendant, they could be of no avail; if plaintiff, they might be made use of against him.

Such is the position taken; and in support of it our attention is called to several cases supposed to be in point, which we will briefly consider. In *Finch v. Finch, 10 Ohio, N. S., 507*, a verbal ante-nuptial agreement upon which, by the statute of frauds, no suit could be brought, was held not available by way of defense to a proceeding for the assignment of dower. In *Comes v. Lamson, 16 Conn., 246*, it was decided that an action to recover the value of personal services could not be defeated by showing that the services were performed under a parol contract which, by its terms, was not to be performed within a year from the making. The like decision was made in *King v. Welcome, 5 Gray, 41*. But it will be observed in each of these cases

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the purpose of the defense was to make the verbal agreement available as a valid contract; and if the attempt had been successful, the verbal contract would in effect have been enforced, and precisely the same benefit would have been had under it that could have been obtained by sustaining the contract in affirmative proceedings instituted for its enforcement. For cases thus circumstanced the doctrine is very clearly and concisely stated by Lord Abinger in *Carrington v. Roots, 2 M. & W., 254.* "The question," he says, "is whether that section which declares that no action shall be brought on a contract, etc., means that the contract shall be available for any purpose as a contract, except that of being enforced by action. I think it does not; and that the contract cannot be available as a contract at all, unless an action can be brought upon it." This is a very clear and accurate statement of the conclusion arrived at in the several cases upon which the plaintiffs rely. If it is sought to enforce the ineffectual contract in any form, the statute is held to forbid it equally whether the party relying upon it is plaintiff or defendant.

But it cannot be said with any accuracy that it is sought in this case to make use of the representations as a contract, or to charge the plaintiffs upon, or by reason of them, unless some different effect or some greater force is to be given such representations as against the plaintiffs from any they could have had if proved in a suit with third persons. If they are to affect a suit brought upon the note by these parties, only in the same way and to the same extent as they might have affected a suit brought by any third person upon the note, then it is manifest the representations do not derive their importance in the suit from the circumstance of having been made by a party to it; but on the contrary, they are important only by reason of their falsity, and because of being made by the procurement of the maker of the note, and for the purpose of obtaining the endorsement by means thereof. Such being the case, it is evident that the proof is not put in in order to

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charge the party plaintiff, either by defeating a valid contract in his hands, or by reducing a recovery thereon, as might be done through the establishment of some set-off or claim to recoupment. On the contrary, the purpose is to show that no valid contract ever came to his hands; that he has purchased a paper which in its inception was wholly void and worthless, and upon which, consequently, no person could possibly have a right of recovery, unless he has become possessed of it under such circumstances of good faith and payment of value, as by the rules of the law merchant will preclude the invalidity being set up and relied upon. The defense of fraud, therefore, is not personal to the party who sues; its purpose is not in any way to charge or affect him personally, but the evidence of fraud is aimed at the validity of the contract previous to its coming to the plaintiffs' hands, and nothing in the case will be peculiar by reason of any particular person being plaintiff, except the facts which attended his purchase of the paper, and which might tend to show his good faith, or, on the other hand, to charge him with notice of the fraud. Indeed, in the case before us, it is not Lenheim who insists that the suit should be affected by the circumstance that the representations were made by one of the parties suing, but it is the plaintiffs who set up this claim. His position is, that the endorsement is void by reason of the false representations of the maker's agent by means of which it was procured; but the plaintiffs in effect say: "True, this contract may be void in the hands of others, but in our hands it cannot be shown to be so, inasmuch as one of us was the agent through whose representations it was procured; and though, as against any other persons, you might prove these representations false and fraudulent, as to us, you are precluded by the statute of frauds, and in consequence of our very agency in the fraud, from making the fact appear." Such in effect is their position; and it is manifest that, instead of making use of the statute to prevent a charge being established against them, they are

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relying upon it to build up a right in their own favor, which confessedly could not exist in favor of any other person who should become owner of the note with the like knowledge of the facts attending its inception. Assuming that there was fraud in the case, then, upon the plaintiffs' theory, the party who was the instrument of the fraud, may recover upon the contract though another could not, because the law will permit the fraud to be proved as against others, but not as against him. This is certainly to give a very peculiar and anomalous effect to the statute; and if the position is correct, this is probably the only instance in the law in which a party is permitted, because of his own participation in a fraud, to claim and enjoy valuable pecuniary privileges and exemptions, which are not permitted to parties who were strangers to it. But to state the position seems to us sufficient to disprove it, and to show how wide a departure such a construction would be from the purpose of a statute which was passed to prevent frauds, and not to encourage their commission.

When the indorsement is shown to have been invalid in its inception, it is only necessary for the defendant to prove the additional fact that the plaintiffs took the note with knowledge or notice of the invalidity. It is immaterial how this notice came to them, so that they actually had it in due season. What the defendant claims in this case is, that the plaintiffs had notice of the fraud by reason of one of them having been privy to, and a participant in it. If he was thus privy to it, then it is manifest that the plaintiffs cannot recover upon the contract of indorsement, because it would be impossible for them, under such circumstances, to become purchasers of the note in good faith and in reliance upon it as a valid and legal instrument.

It follows that the circuit judge erred in his instructions to the jury, and that the judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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Neil McAuliffe v. William Farmer.

Fraudulent sale: Third parties: Creditors. One who has received goods of B, under a conditional arrangement to buy them of him, but who is not a creditor of A, or the representative of a creditor, is not in a situation to attack a prior sale of said goods by A to B, as fraudulent against A's creditors.

Trover: Fraudulent sale: Garnishee proceedings: Res inter alios. In an action of trover, brought by B against C, for the conversion of goods which B had bought of A, and then sold to C on condition that payment should be made on delivery, it is no defense that C has been garnished by A's creditors, whether the sale from A to B was voidable at the instance of A's creditors or not; B's title could not be divested or in any way affected by these garnishee proceedings to which he was not a party.

Heard April 9. Decided April 15.

Error to Saginaw Circuit.

Huckins & Sutherland, for plaintiff in error.

L. T. Durand, for defendant in error.

Graves, J.

This was an action of trover, commenced by the defendant in error about the 17th of October, 1871, against the plaintiff in error, to recover damages for the alleged conversion of a quantity of household and other goods. On the 14th of November, 1872, the defendant in error obtained a verdict for two hundred and fourteen dollars and eighty-seven cents, on which judgment was entered on the 9th of December following.

That judgment, with a bill of exceptions, is now before us on writ of error. And the only objection to the proceedings is based on a single exception to so much of the charge to the jury as related to the nature and validity of the principal defense. A proper understanding of it requires a brief reference to the facts.

The evidence for the plaintiff below, William Farmer, tended to show that in August, 1871, the property alleged to have been converted was owned by one Mercer, but was in the actual possession of one Richard Farmer, who was

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Mercer's son-in-law, and also his agent, authorized to make sale of the goods; that, under these circumstances, he (William Farmer) innocently, and in good faith, purchased the articles of Mercer through the agent (Richard Farmer), for three hundred dollars; that he (William Farmer) thereafter bargained the goods to the plaintiff in error for two hundred dollars, but upon the condition that payment should be made on delivery, and that no title should pass before such payment; that the plaintiff in error got the goods, and failed to pay, and immediately sold a large portion and converted the same to his own use, and then refused to return the goods or pay any thing for them, and gave as an explanation, that he had sold most of the articles and had been garnished as a debtor of Richard Farmer.

The plaintiff in error then gave evidence tending to prove, that when the cause was commenced certain garnishee proceedings before a justice of the peace were pending against him in suits by Mosher and Mickley against Richard Farmer, who, they alleged, was indebted to them; that the garnishee process was served on him (the plaintiff in error) after he received the delivery of the goods from William and Richard Farmer, and that on October 24th, 1871, judgments were rendered by the justice against Richard Farmer, the principal defendant, in those suits. No judgment had been rendered against the plaintiff as garnishee up to the time of the trial in the case at bar.

He also gave evidence tending to show that the goods were owned by Richard Farmer, and not by Mercer, at the time of the alleged sale to the defendant in error, and that the transfer by Richard to William was made with intent to defraud the creditors of Richard.

The circuit judge charged in substance that the plaintiff in error was not in a situation to attack the sale to William as fraudulent against Richard's creditors, and further that the pendency of the garnishee proceedings against the plaintiff in error in the suits against Richard Farmer could

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not deprive William Farmer of his remedy against the plaintiff in error for the conversion of the goods, if William was the true owner.

It is of this instruction that the plaintiff in error complains, and we think it affords him no ground of objection. He received the goods under a conditional arrangement to buy them of the defendant in error, and did not obtain possession as the bailee or vendee of Richard Farmer. He was not a creditor of Richard Farmer, or in any situation to be regarded as the representative of a creditor. If the purchase by William was voidable at the instance of Richard's creditors because it was made with intent to defraud them, it was only assailable on that ground, by the creditors or the proper representatives of the creditors of Richard, and not by the plaintiff in error, who had obtained possession by the bargain with William, and who was neither a creditor nor in a position to represent a creditor.

If the garnishee proceedings brought by Richard's creditors had not been instituted, there would have been no shadow of pretence for the position taken by the plaintiff in error, and we do not see how the pendency of these proceedings placed him in any better situation in this respect than he would have held if they had never been taken. William was in no way a party to the suits before the justice, or any branch of them, and his rights were not subject to be litigated in them. His title was not open to contest in a proceeding behind his back, and to which he was in no way or in any sense a party.

As the matter excluded by the charge was not such as to be available to the defense, the direction was proper.

No error being shown, the judgment should be affirmed, with costs.

The other Justices concurred.

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David Verplank v. Harvey B. Hall.

Description of premises: Initial point: Fractional quarter. Where the initial point in the description of premises in a deed is the south-east corner of the north half of the south-east quarter, fractional, of a section, and the quarter section is made fractional by a meandered lake, so situated as to cover the eastern and central portions thereof, and the parcel described was carved out of the north half within a year after the same was patented, the south-east corner in question is construed to be the point which constituted the south-east corner of the land as it was surveyed out and patented by the government, which locates it on the meandered line of the lake; and the fact that the waters of the lake have since receded, cannot change the boundaries of the lands described, as previously located.

Equity pleading and practice: Bills to quiet title: Possession: Proofs. Under a bill to quiet title, where the answer relies upon an adverse right depending entirely upon the location of the description, the proof of possession is not required to be as strict as when there is a defense distinctly set up and relied upon.

Heard April 11. Decided April 15.

Appeal in Chancery from Calhoun Circuit.

Brown & Patterson and *C. I. Walker*, for complainant.

No counsel appeared for defendant.

COOLEY, J.

This case was submitted without argument on either side. The bill was filed to quiet the title of complainant to a piece of land described as being the south part of the north half of the south-east quarter, fractional, of section number nine, in town two south, of range four west, beginning at the south-east corner, thence running south eighty-six degrees west, twelve chains and fifty links; thence north five degrees west, twelve chains and eighty links; thence north eighty-six degrees east, twelve chains and fifty links; thence south five degrees east, twelve chains and eighty links, being sixteen acres of land. It is not denied that complainant owns land of this description, but the disputed questions relate to its location. It appears that the north

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half of the south-east quarter of the section named is rendered fractional by a small meandered lake, which occupies the central part of the east end of the quarter section, leaving on the north-half of the quarter only 47 87-100 acres, and on the south-half only 52 13-100 acres of land, embraced in the fractions respectively as surveyed under the authority of the United States and patented to the original purchasers. It is the existence of this lake, and the peculiar shape of the north fraction, that raise the question in dispute between these parties.

The sixteen-acre parcel, it will be seen, is in nearly a square form. If in locating it the initial point should be taken on the west line of the section, at a point half way between the north and south lines of the quarter—which would be the initial point of a similar description to be taken from a half-quarter which was not fractional—then the land, according to the original survey, would have been nearly all under the waters of the lake. But this, the defendant insists, is the proper location of the land described. On the other hand, the south part of this north half of the quarter section as surveyed, is the part lying west of the lake, and the most south-easterly point is where the line between the north and south halves intersects the meandered line on the west side of the lake. Taking this as the initial point, as complainant insists should be done, the sixteen acres is dry land. The question is complicated by the fact that the waters of the lake for a long time have been receding, so as to leave more and more land on the west side, and so as to make the south-east corner, if a point on the shore of the lake is to be taken as such, a movable point gradually advancing to the east. If, therefore, a conveyance has at any time been made with reference to such a moveable point, the question of the actual location of the land conveyed would be, as the evidence in this case shows, one of very great doubt and difficulty, by reason of the uncertainty as to the actual location of the shore line at any specified time.

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The half-quarter appears to have been patented to Sunderland Pattison in 1839. The sixteen acres in question was carved out of it by deed given in 1840. It is not probable that the waters of the lake had receded essentially up to that time; and when this conveyance was made, which purported to carve out a particular parcel of land from a larger parcel which only a year before had been conveyed by the government by a particular description taken from its surveys, and the same description was adopted in the deed, we have no reason to suppose that any other or different land was understood by the parties as embraced by it than was embraced within the surveys from which the government description was taken. In other words, when the party takes as the starting point in his conveyance the "south-east corner" of the north half of the quarter section, we are to understand him as meaning the point which constitutes the south-east corner of the land as the same was surveyed out and patented by the government. Taking this to be the meaning, the south-east corner of complainant's land must be located in accordance with complainant's view; that is to say, on the border of the lake as surveyed by the government, at the point where the line between the north and south halves of the quarter section would intersect the same. We think this the true construction of the deed under which complainant derives title, and consequently that he is entitled to the relief prayed. It is also in accordance with the practical location of the land by the parties to the first conveyance.

Inasmuch as the defendant did not appear in this court, and there is some complaint of desertion by counsel, we have examined the record with care to see that nothing that would tell in his favor should be overlooked. But we discover nothing bearing upon the main subject of dispute that tends to cast doubt upon complainant's case. Some question might perhaps have been made regarding the sufficiency of the evidence of complainant's possession; but, as defendant by his answer distinctly plants him-

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self upon an adverse right, depending entirely upon the location of the description, the complainant was not called upon to put in such strict proofs of possession as might have been requisite in other cases.

The circuit court in chancery having reached a different conclusion, its decree must be reversed, with costs, and a decree entered in this court in accordance with the prayer of the bill.

The other Justices concurred.

The Township of Dayton v. Henry Rounds; and The Township of Dayton v. Robert E. Warren.

Bounty bonds: Statute construed: Remedy: Mandamus. Under the statute (*Comp. L. 1871*, §§ 3927-36) authorizing the payment of bounties to volunteers, etc., the bonds provided for are intended to be put upon the footing of established liabilities against the township, to be presented, like other claims, for orders on the treasury, to the township board; and an action against the township is not the proper remedy to enforce payment; but the proper redress for any refusal of the town officers to do their duty in this regard is by *mandamus*.

Submitted on briefs April 11. Decided April 15.

Error to Tuscola Circuit.

B. W. Huston, Jr., for plaintiff in error.

M. D. Seeley and *Minock & Baker*, for defendant in error.

CAMPBELL, J.

Both of these cases are suits to recover upon bounty bonds, issued by the township of Dayton in December, 1863, payable February 10, 1865, and within the terms of the enabling act of February 5, 1864.

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By the first section of that act it was declared that these bonds "shall be a valid and lawful claim against the township, county or city having voted, raised, hired, authorized or issued the same, and shall be paid in the same manner as the ordinary township, county or city expenses are paid."—*Comp. L. 1871, § 927.*

By the fourth section it is provided that "the claims and liabilities herein declared to be valid" "shall be assessed, levied, collected and paid, in the same manner as ordinary claims and liabilities are assessed, levied and paid."—*§ 930.*

Section 2 requires the allowance and payment of such claims, except as therein otherwise provided, to be made in the same manner as ordinary claims are allowed and paid. Section 5 requires the township clerks to certify each year to the supervisors the amount of such indebtedness, to be incorporated in the assessment roll.

It was evidently the design of the legislature to put these bonds on the footing of established liabilities against the township, to be presented, like other claims, for orders on the treasury, to the township board. All moneys drawn from the treasury for their payment were to be upon the customary orders. If the bonds were actually issued by the township, the law declared them valid, and permitted no inquiry into that question. But it did not dispense with the necessity of seeking their payment in the ordinary way.

A remedy by action is not the proper remedy in such a case. And any refusal by the town officers to do their duty should be redressed by *mandamus*. A township ought not to be subjected to the expense of a suit upon such a claim when the law requires it to be presented to a board for allowance. Such has been the settled practice in this state for many years.—*People ex rel. Anderson v. Township Board of La Grange, 2 Mich., 187; Marathon v. Oregon, 8 Mich., 372; People v. Auditors of Wayne County, 5 Mich, 223; People v. Townships of Porter and Calvin, 18 Mich., 101.*

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If these claims had been presented to the town board, and title shown in the claimants of the bonds, it is presumable they would have been paid; and until the board neglected or refused to do justice, there could have been no occasion for resort to the courts. The remedy by *mandamus* is simpler and speedier than any other to obtain all the benefits to which the holder of such bonds would be entitled, and is, in our opinion, the one which should have been adopted.

The judgment should be reversed, with costs. The reversal being upon the pleadings, there will be no new trial.

The other Justices concurred.

Edward Erskine and another v. John Messicar.

Statute of limitations construed. Under our statute of limitations of personal actions (*Comp. L. 1857, ch. 165*) a cause of action which accrued in Canada upon a promissory note in favor of a Canadian resident who has never been within the United States, is not barred by the defendant's residing more than ten years in this state; the disability of absence from the United States under the statute (§ *5366*) applies to such a case, and prevents the limitation from running.

Heard April 13. Decided April 15.

Error to St. Clair Circuit.

A. E. Chadwick, for plaintiffs in error.

O'Brien J. Atkinson, for defendant in error.

CAMPBELL, J.

The only question in this case is whether a cause of action which accrued in Canada on a promissory note, in

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May, 1854, in favor of a Canadian resident who has never been within the United States, against persons who then lived in Canada, but had been in Michigan more than ten years before suit brought, is barred.

It is claimed that by section 7 of the statute of limitations all personal actions must be brought within ten years, if the plaintiff has continued abroad.

That section is as follows: "All personal actions on any contract, not limited by the foregoing sections, or by any law of this state, shall be brought within ten years after the accruing of the cause of action, and not afterwards."

The previous sections had limited actions of assumpsit to six years; and section six contains this specific provision concerning foreigners: "If any person entitled to bring any of the actions *mentioned in this chapter*, shall, at the time when the cause of action accrues, be absent from the United States, such person may bring the action within the times in this chapter respectively limited, after the disability shall be removed."

This is a plain and unequivocal provision, applying as directly to the ten years clause of section 7 as to any other, and declaring in the most express terms that the statute shall not run in case of such a disability. It applies to every action mentioned in the chapter. The subsequent amendments do not reach this case, and their effect need not be considered.

The only case which seems to have raised any doubt upon this subject is *Von Hemert v. Porter, 11 Metc., 210.* That decision contains the following language concerning a similar section in the Revised Statutes of Massachusetts: "And we think it was also designed to embrace those causes of action founded upon contracts originating abroad, between foreigners and our citizens, and which by their terms were to be performed in the country where contracted, when the foreigner never comes into the state, as being cases not contemplated and embraced or affected by the other provisions of the statute, nor limited by the provisions

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of the sixth section; and that, as to such contracts, if attempted to be enforced in the courts of the commonwealth, they are to be commenced within twenty years after the cause of action accrued; unless, within that time, the foreigner shall bring himself within the provisions of section 6 by coming into the commonwealth."

As our statutes contained this section before this decision, it has no binding force beyond its reasoning. No reason is given for the conclusion, and if correct, it certainly would revolutionize some of the best established rules of law. The only ground which seems to be hinted at is, that section 6 of the statute was not intended to apply to foreign contracts. But the exemption of persons "beyond seas" has been consistently applied from the earliest times, to such contracts. The idea dimly shadowed out would seem to be, that the limitation bore on the right as well as on the remedy. But no such doctrine has ever been maintained. And it would require us to put into the very clear provisions of the sixth section, saving the rights of non-residents, a *proviso* that the cause of action must have accrued in this state, or in the United States. The language will not bear that restriction.

It is very easy to see that this protection may be unwise, but we cannot find any escape from the statute.

The judgment must be affirmed, with costs.

The other Justices concurred.

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The People on the relation of William Smith v. The Judge of the Wayne Circuit Court.

Declaration: Writ: Form of action: Variance: Practice. A declaration cannot be set aside on motion for variance from the writ in the form of action; such variance in non-bailable actions is entirely immaterial; and even in bailable actions it would operate only to discharge the bail and not to render the declaration a nullity.

Heard and decided April 16.

Application for *mandamus*.

The relator brought suit in the Wayne circuit against Zina Lloyd, by summons in a plea of "trespass on the case," which was duly served. He afterwards declared in an action for breach of covenant. Defendant's counsel moved to set aside this declaration, on account of its variance from the summons in respect to the form of action, which motion the respondent granted, after full argument, and an order was entered in said cause setting aside the declaration and striking it from the files. The only ground upon which this order was granted was the variance aforesaid. The relator now applies for *mandamus* to compel respondent to vacate said order and re-instate the declaration.

A. F. Wilcox, for the relator.

Ervin Palmer, for the respondent.

THE COURT held that a declaration could not be set aside for variance from the writ; such variance in non-bailable actions is entirely immaterial; and even in bailable actions it would operate only to discharge the bail and not to render the declaration a nullity.

Mandamus granted.

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John W. Stearns and others v. Jeremiah L. Taylor and another.

Attachment: Personal service. A service of a copy of the inventory alone is not a sufficient personal service of an attachment under the statute (*Comp. L. 1871, § 6403*); a copy of the attachment is required also, and the statute must be followed substantially.

Attachment: Service on property: Foreign county. Service of an attachment upon property cannot be made in a foreign county until after service has been made in the county where the process issued; service in a foreign county in the first instance cannot be made the basis for proceeding by publication.

Appearance: Waiver. Appearance of a defendant in such case to enter dfeault of the plaintiffs for not declaring, does not preclude him, after the default has been set aside under a stipulation that his appearance should not waive any irregularity or defect in the process or proceedings, from making any objection to the proceedings which he could have made on a special appearance to complain of defects.

Practice in circuit courts: Attachment: Dismissal. A dismissal of the cause in which such proceedings had been taken, seven months after the return day of the writ, is not error.

Heard April 8. Decided April 22.

Error to Manistee Circuit.

S. W. Fowler, for plaintiffs in error.

Ramsdell & Benedict, for defendants in error.

GRAVES, J.

The plaintiffs in error caused an attachment to issue in their favor out of the circuit court for the county of Manistee against the defendants in error, and returnable in April, 1872, and tested the preceding November.

The writ seems to have been returned in December, 1871, and the only evidence of service consisted of a certificate by the deputy of the sheriff of the county of Manistee, in these terms:

"STATE OF MICHIGAN, MANISTEE COUNTY, *ss:*

"I do hereby return that by virtue of the annexed writ of attachment, I have this 20th day of November, A. D. 1871, attached the several parcels of land described in an

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inventory hereto annexed and herewith returned, all of which property was appraised by William Tollins and G. Sheldon of Mason county, and E. J. Copley and G. Copley of Wexford county, four disinterested freeholders, who were first by me duly sworn to make a true appraisement thereof, and whose appraisement is in writing, signed by themselves, and herewith returned. And I do further return that on the 12th day of December, 1871, I served Jeremiah L. Taylor, one of the within named defendants, with a *copy of an inventory of said property* and certified by me as I am within commanded."

It appeared from the inventory and certificate of appraisal, that the lands seized were all beyond the county of Manistee, part being in Wexford, and the rest in Mason county. No other property was taken, and no service of any kind was made or apparently attempted on the defendant Mehring, nor was any notice published. According to the return, however, as is seen, a copy of the inventory alone, and *unaccompanied by any copy of the attachment*, was served upon Taylor.

At the November term of the court for 1872, the cause was dismissed. The plaintiffs thereupon brought error, and they claim that the record of the cause sent up in answer to the writ of error, and from which the foregoing matters are extracted, shows that the dismissal was erroneous.

We think the sheriff's return did not prove service of the attachment on any one. The statute points out the steps to be taken by the officer in making service, and thereby provides for giving needful information to a defendant. A copy of *the attachment* and inventory, certified by the sheriff, is to be served, and not one without the other. —*Comp. L. 1871*, § *6402*. As this is a regulation as to the mode of bringing a party into court, and is intended for his protection and to enable him take measures for his

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defense, and to free his property from the writ in some of the modes authorized therefor, it cannot be carried out by halves. The service is not complete unless the provision mentioned is substantially followed, and it cannot be said to be substantially followed when nothing is served but a copy of an inventory. The return cannot be made to prove a fact which it does not purport to suggest or certify, and hence there is no chance for contending that it shows that a copy of the attachment was served on Taylor.

While, according to the record then, there was no evidence in the court below of any service of the writ on either defendant, it is pretty plain that the service which was made on property was without effect. The lands seized were in Wexford and Mason counties, and not in Manistee, where the writ issued, and no service was made on property in the latter county.

The law, however, permits a service in a foreign county *only* after service in the county where the process is issued. —*Comp. L. 1871, § 6402.* There was, therefore, no case for proceeding by publication, and no publication seems to have been attempted. The defendant Mehring did not appear at all, but Taylor did so to take a default against the plaintiffs for not declaring. Subsequently, however, this default was set aside under a stipulation in which it was agreed that his appearance should not waive any irregularity or defect in the process or proceedings. There was nothing, therefore, in his position to preclude any objection to which the proceedings would have been subject on a special appearance to complain of defects. Looking at the record, then, to form our judgment, it would seem that there was no service on either defendant, nor any valid service on property, nor any such appearance as would serve to waive the want of service or exclude objections; that no publication even was attempted, and that the proceedings had become, by reason of defects and omissions, wholly ineffectual, unless invested with new life by some stipula-

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tion or waiver of the defendants. We think, therefore, the court did not err in granting the motion to dismiss.

As no error is shown, the judgment below must be affirmed, with costs.

The other Justices concurred.

Stephen H. Willis v. Robert B. Gimbert.

Appeal from justice's courts: Dismissal for want of prosecution: Rule construed. A rule of the circuit in reference to dismissing appeals from justice's courts, which provides for a dismissal on motion where the cause has not been duly noticed for trial for some term not later than the fourth term after the entry of the cause in the circuit, does not apply to a case which has once been duly noticed within the time prescribed, notwithstanding there has subsequently been a delay without noticing for the time prescribed.

Power to adopt rules. Whether the power to adopt such rules is vested in the supreme court, to the exclusion of the circuit courts, so as to render such a rule adopted by a circuit court nugatory:—*Quære?*

Appeal from justice's courts: Dismissal for want of prosecution: Discretion. The circuit courts have authority under the statute (*Comp. L. 1871, § 5455*) to dismiss an appeal for want of prosecution only where there is a delay to prosecute within such time as shall be prescribed by the general rules of the court; and in the absence of any such rule they have no general authority to dismiss at discretion.

Remedy: Writ of error. Error is the proper remedy for reviewing the determination of the circuit in this regard.*

Heard April 8. Decided April 22.

Error to Calhoun Circuit.

Defendant in error moved to dismiss the writ on the ground that the determination complained of was a summary statutory proceeding, and not according to the course of the common law, and that therefore error was not the proper remedy.

THE COURT held that error was the proper remedy, and denied the motion.

* See *Matter of Hicks, 20 Mich., 129.*

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Alvan Peck and *A. M. Culver*, for plaintiff in error.

John C. Patterson, for defendant in error.

COOLEY, J.

The writ of error in this case is sued out to reverse a judgment of the circuit court, dismissing an appeal from a justice's court, with costs. The dismissal was upon the ground that the appellant had failed to bring the case to trial in accordance with a rule, numbered 100, which had been adopted by the circuit court, and which the circuit judge held was obligatory upon him. The rule in question is as follows:

"Rule 100. Any civil cause hereafter brought into this court by appeal from the judgment of a justice of the peace, shall, at the instance of the appealing party, be duly noticed for trial for some term not later than the fourth next after the entry of the cause in this court, and any such cause already depending in this court, shall be so noticed for some term not later than the fourth next after the present term, and if said cause is not so noticed, the appeal shall be discontinued, with costs, on motion of the appellee; and a notice which shall be revoked, shall not be deemed a due notice within the intent of this rule. Ordered that the foregoing be and the same is hereby adopted as the 100th rule of this court."

The appellant, who is plaintiff in error, insists that the power to adopt such rules is vested by law in the supreme court to the exclusion of the circuit court, and that consequently this rule was entirely nugatory. We have not deemed it necessary to consider this question, as we are clearly of opinion that, assuming the rule to be valid, the court erred in holding this case to be within it.

The appeal in the case was perfected by filing appeal papers, September 7th, 1868. The record shows that at the November term, 1869, the case was on the docket for

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trial on the notice of the appellant, but for some reason was not tried. For the next four terms it was not noticed for trial, and at the fourth it was dismissed.

It thus appears that the appellant did, at a term not later than the fourth from the time of taking the appeal, duly notice the case for trial as required by the rule. He had, consequently, fully complied with its provisions; and if he was guilty of any delay afterwards, the case was one for which the rule made no provision. The appeal, therefore, should not have been dismissed for the reason assigned.

It is urged that the circuit court in its discretion might dismiss the appeal for delay in prosecution. The statute, however, only gives authority to do this where there is a delay to prosecute within such time as shall be prescribed by the general rules of the court (*Comp. L. 1857*, § *3859*; *Id. 1871*, § *5455*); and it is not claimed that any other rule affects the case. And as both parties have equal rights to notice the case for trial, and equal and the same means for expediting the proceedings, no very obvious reason exists for giving the circuit court a general authority to dismiss at discretion, and we do not think such authority has been conferred.

As we find, therefore, that the case was dismissed on an erroneous construction of the rule in question, and that no other authority existed for this action, the judgment must be reversed, with costs, and the case remanded.

The other Justices concurred.

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Frank Giddey and others v. Edwin F. Uhl.

Description of property: Chattel mortgage construed. The description of property in a chattel mortgage, after enumerating certain articles specifically, concludes, "carpets, bedding, bedroom furniture, and other personal property in and about said house and premises; except herefrom such personal property as is exempt from execution by the laws of the state of Michigan, to wit: stoves in use, family pictures, library and school books, clothing, provisions, fuel and sewing machine; also excepting household goods, furniture and utensils therein, of the value of two hundred and fifty dollars;" the mortgagors had at the time in said house two hundred and fifty dollars worth of goods, furniture and utensils, besides the enumerated articles and those exempt from execution:—

Held, That, construing this mortgage in the light of the facts found, the exception applies to the property described generally, and not to the articles specifically enumerated, and that the specific articles are intended to be mortgaged unconditionally.

Finding of facts: Chattel mortgage: Assignment: Mortgage debt: Presumption. A finding of facts which shows that a chattel mortgage was assigned to the plaintiff for a valuable consideration, in the absence of any showing that there was any other instrument to which the mortgage was collateral, will be construed as a finding of an assignment which was effectual to pass the interest of the mortgagee, and is not open to the objection that it fails to show an assignment of the debt, and is therefore insufficient; it will not be presumed in such case that the mortgage was collateral to any other instrument; on the contrary, the presumption is the other way.

Whether the assignment of a mortgage collateral to some other instrument by which the debt is witnessed does not convey the mortgage to the assignee, as trustee for the owner of the debt, so as to authorize that trustee to maintain a suit at law for the property or its proceeds:—*Quære?*

Heard April 11. Decided April 28.

Error to Wayne Circuit.

This is an action of replevin brought by Edwin F. Uhl against Frank Giddey, John Baxter and William Baxter. The plaintiff claimed title under the chattel mortgage mentioned in the opinion. The defense was, that defendant Giddey, as constable, had taken the goods described, by virtue of an execution issued upon a judgment in favor of the other defendants, against Franklin W. Whittlesey. The cause was tried by the court without a jury, and a special finding was filed, which finds, among other things, "that the one sofa, one lounge, two marble-top tables, two easy chairs, and three parlor chairs, mentioned in said mortgage,

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is the same property described in the declaration." The judgment below was in favor of plaintiff, and defendants bring error.

C. J. O'Flynn, for plaintiffs in error.

Moore & Griffin, for defendant in error.

CHRISTIANCY, CH. J.

The chattel mortgage in question in this case was executed by Franklin W. Whittlesey and wife to Lyman D. Norris, and describes the mortgaged property as follows: "All the following described household furniture and personal property, now upon the premises, No. 25 George street, in the city of Detroit, owned and occupied by the Whittleseys aforesaid, viz.: 1 sofa, 1 lounge, 2 marble-top tables, 2 easy chairs, 3 parlor chairs, 1 black walnut center table, 2 card tables, 1 what-not, 2 cane chairs, 1 secretary, 1 lounge, carpets, bedding, bedroom furniture, and other personal property in and about said house and premises; except herefrom such personal property as is exempt from execution by the laws of the state of Michigan, to wit: stoves in use, family pictures, library and school books, clothing, provisions, fuel, and sewing machine; also, excepting household goods, furniture and utensils therein, of the value of two hundred and fifty dollars."

The judge, in his finding of facts, finds that the mortgage was executed and received in good faith to secure the sum of eight hundred and sixty dollars of money advanced to Whittlesey and wife, at the time of its execution, which is still unpaid; that the mortgagee afterwards assigned said mortgage to the plaintiff for a valuable consideration, and that at the time of making said mortgage and at the time of the taking of the property by the defendants, said Whittlesey and wife had in their said house, belonging to them, over and above the articles mentioned in said mortgage as exempt, and aside from the articles specified with numerals,

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household goods, furniture and utensils, of a value exceeding two hundred and fifty dollars.

It is insisted by the plaintiffs in error that the exception contained in the mortgage, of household goods, furniture and utensils to the value of two hundred and fifty dollars, renders the mortgage entirely uncertain as to the property intended to be mortgaged; and that the mortgaged property cannot, for this reason, be identified. And if this exception applies to and affects the specially enumerated articles, this may be a very pertinent objection, or might be so if it did not appear that the mortgagors had at the time two hundred and fifty dollars worth of goods, furniture and utensils, besides the enumerated articles and those exempt from execution. But, construing this mortgage in the light of the facts found, we think it appears with reasonable certainty that this exception was intended to apply to the property mortgaged by the general description only, and not to the articles specifically enumerated. We think the intention was to mortgage the specific articles unconditionally; that the general description, which follows the specific enumeration, was intended to give so much further security as the property thus generally described would give, after deducting from it what was exempt from execution, and two hundred and fifty dollars worth of household goods, furniture, and utensils besides. This was the construction adopted by the circuit judge, and we think it clearly correct.

But it is further objected by the plaintiffs in error that, though the finding shows that the mortgage was assigned to the plaintiff below (defendant in error) for a valuable consideration, it does not show that the debt secured by it was assigned; and that an assignment of the mortgage alone conveyed no interest. It is a sufficient answer to this to say, that the finding does not show that there was any other instrument by which the debt itself was witnessed, or to which the mortgage was collateral; and, as it is just as competent, and we think about as usual, to insert in the

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mortgage itself an agreement to pay the debt, we cannot presume that the mortgage was collateral to any other instrument, but may fairly infer that there was none, as none is mentioned. The finding, therefore, that the mortgage was assigned to the plaintiff for a valuable consideration, ought to be understood as an assignment which was effectual to pass the interest of the mortgagee. We are not, however, prepared to say that the assignment of a mortgage collateral to some other instrument by which the debt is witnessed, would not convey the mortgage to the assignee, as trustee for the owner of the debt, and authorize that trustee to maintain a suit at law for the property or its proceeds; but we do not think it necessary to consider this point here.

We see no error in the record, and the judgment of the circuit court must be affirmed, with costs.

The other Justices concurred.

Harriet J. Comstock v. Joseph B. Comstock and others.

Homestead: Bill in equity: Married woman. It is no defense to a bill by a married woman to have a homestead right set off to her, that her husband at the time of the filing of the bill was providing her a comfortable home.

Homestead: Married woman: Bill in equity: Preventive remedy. Where the homestead right is absolutely denied, and its actual enjoyment seriously endangered by the foreclosure of what are claimed to be purchase-price mortgages, the bill filed by the wife cannot be said to be premature because no execution had been levied on the premises and no sale advertised under any decree; the right is one which, from its nature and incidents, may well appeal to preventive remedies.

Homestead: Husband and wife: Mortgages: Foreclosure: Redemption. Where it appears that the defendants to such a bill are seeking to foreclose a mortgage on the premises claimed as a homestead, which is signed by the husband alone, by suits to which the wife is not made a party, on the ground that it is a purchase-price mortgage, it is no defense to the relief sought, that the husband is still entitled to redeem from the foreclosure, and is not alleged to be unable to do so, and that no fraud is alleged.

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COMSTOCK v. COMSTOCK.

Married woman: Homestead. The right of a married woman to sue in such cases is by the statute (*Comp. L. 1871, § 4805*) placed upon the same basis as her right to prosecute in relation to her sole property.

Heard April 11. Decided April 28.

Appeal in Chancery from St. Clair Circuit.

John Atkinson and *A. E. Chadwick*, for complainant.

Cyrus Miles and *R. P. Eldredge*, for defendants.

GRAVES, J.

The complainant, who is the wife of Alfred Comstock, filed the bill in this cause to secure a homestead right. The bill was dismissed by the circuit court in chancery, and the complainant has brought her case here by appeal. Her claim is contested only by the defendants, Joseph B. and Abiathar W. Comstock.

The lands, as set forth in the bill, in which a homestead exemption is sought, are the northwest quarter of section twenty, the east half of the southwest quarter, the east half of the northwest quarter, and the west half of the southwest quarter, of section seventeen, in township eight north, in the county of St. Clair. The main facts requisite to show that complainant and her husband had an actual homestead on this land are alleged, and no question is made on that subject, and it appears to have been located on the north-west quarter of section twenty. The bill then represents that the husband, after this actual establishment of the homestead, mortgaged the premises to the defendants, Joseph and Abiathar, but not for purchase money; that she did not join in either mortgage, and that she has been informed these mortgages have been foreclosed, though she was not made a party to any foreclosure proceedings. She also alleges that the defendant Joseph has deeded "said lands" to Cyrus Miles and O'Brien J. Atkinson, and that they "assert some kind of title thereto under such deed." She then avers her claim to a specified forty acres

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on the north-west quarter of section twenty, embracing the house and out-buildings, and asks that the designated parcel may be set apart as her homestead.

The answer is understood as asserting, that prior to March 1st, 1765, the complainant's husband only owned an undivided one-half, which he purchased of Joseph and Abiathar, and mortgaged back for the purchase money; and that all right to that interest has been cut off by foreclosure of such purchase-money mortgage; and that about March 1st, 1865, the defendant Joseph sold to complainant's husband the other undivided half of said lands, with other premises, and received back a purchase-money mortgage covering the interest sold, and which mortgage is now in process of foreclosure in chancery; and that Alfred, the husband, has no interest whatever, except the right to redeem this last named undivided half by paying nearly five thousand dollars before the completion of the foreclosure. The answer admits that complainant was not a party to the mortgages, and that she was not joined in the suits to foreclose; and it also expressly denies that she has any homestead right whatever in the premises.

The record is somewhat vague and confused, and we think it would be unprofitable to make extended citations from it, or include in our opinion much more than the results to which our examination has led.

After a careful investigation of the facts presented, in their different bearings, we are unable to reconcile with the evidence or with probability, the statement of defendants, that the mortgages mentioned in the pleadings were given for purchase money of these premises. There is no such correspondence in dates and in other particulars as, according to the natural and common course in such matters, would be looked for in case of mortgages given, or meant to be given, back for purchase money; and, on the other hand, there are several circumstances which strongly countenance the idea that they were not such securities. This opinion is somewhat fortified by the failure

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of the defendants to give clear and harmonious explanations.

The evidence relating to the state of the title is not so full, connected and explicit as we should desire. But, looking at the proofs as they lie before us, with such explanations as may be found scattered through the record, we are led to conclude that on the 7th of December, 1852, Lorenzo M. Mason, who seems then to have owned this interest, conveyed to Alfred Comstock, the husband, an undivided three-fourths of the north-west quarter of section twenty, and of the east half of the south-west quarter of section seventeen, of the tract mentioned in the bill, and that on the 16th of February, 1865, Joseph B. Comstock, who was then, as he claims and as the record indicates, the owner of that interest, conveyed the remaining undivided one-fourth of said parcels to said Alfred. The title to the whole interest in these parcels, then, would seem to have been passed by these conveyances to complainant's husband. And it is admitted, or at least claimed and proved on the part of complainant, and not disputed by defendants, that during the whole period from a date prior to the conveyance by Mason in 1852 to the time of filing the bill, the complainant and her husband have lived and made their home in the dwelling house on said northwest quarter of section twenty, and where the bill asks to have the homestead set apart.

The defendants do not pretend, and we find no evidence or indication that the complainant has, since the conveyance by Mason to her husband in 1852, in any way joined in or consented to any alienation of or charge upon these parcels or either of them. On the contrary, she avers that she has done nothing of the kind.

On the argument the first objection raised by defendants was, that it appeared from the case that when complainant filed her bill her husband, Alfred Comstock, was providing her a comfortable home. Admitting this to be so, we do not see that it affords any answer whatever to her demands

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She does not complain that her husband has not, and may not hereafter furnish *a* home for her. She alleges a right of her own in *the* existing home, which she can maintain against invasion. She insists that as against the defendants she has a fixed homestead right where she is, and that they have put forth a claim to deprive her of it, and are moving to deprive her of it.

Now, the law, where the circumstances meet its requirements, gives an absolute right to the homestead, and in doing so it has a deeper meaning than a mere purpose to secure a present shelter for the husband and wife. It looks to the needs of the social state as connected with the public welfare, and aims to promote and secure the integrity and unity of those little commonwealths known as families; and not merely for the benefit of the members considered as individuals, but with a view to the general good which is felt to be measurably bound up with the well-being of these domestic establishments.

The law, then, ought to be construed and administered, as far as may be, according to its principle, design and policy. The whole spirit of it indicates that protection to the homestead ought to continue and be subject to be invoked by the wife whenever circumstances menace an invasion of the right, and we cannot regard the fact that the husband at the time of complaint is supplying a home, as a pertinent reply where the case shows that the right itself is absolutely denied and its actual enjoyment seriously endangered. Neither can we accept any view which would require the wife to postpone applying for legal protection until actually turned out and altogether deprived of the benefit of the homestead. The right, from its own nature and incidents, is one which, according to principle and all analogies, may well appeal to preventive remedies.

The next objections are, that when the bill was filed no execution had been levied on the premises, and no sale even advertised under any decree; that complainant's husband was still entitled to redeem, as against the foreclosure, and

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is not alleged to be unable to do so, and that no fraud is alleged to have been committed in relation to the mortgage transactions.

Besides what has been said already, only a few words are needed on these objections. The case shows that the defendants not only deny the complainant's right to the homestead, but are prosecuting behind her back upon a basis which would exclude her right. They say that she has no right, and then avow that her husband has no interest except what he holds subject to a purchase-money mortgage, which is in course of foreclosure, and which, if duly established and foreclosed as a purchase-money mortgage, will exclude all homestead right as against her husband, and expose the complainant to be expelled from the possession. Now, one of the material matters in dispute is, whether the mortgages referred to are purchase-money mortgages; whether they *are* mortgages which may be made *to cut off* a homestead right. The complainant can try that question in this case, but she cannot in the foreclosure suit, because she is not a party to that suit. She maintains that the mortgages were not purchase-money securities, and we have already stated our agreement with her position on this point.

These circumstances and this attitude of the parties, it seems to us, are sufficient to justify the complainant in proceeding. She was not required to wait until dispossessed, or at least threatened with dispossession, by process after foreclosure. On the contrary, it was extremely proper for her to act promptly if she intended to act at all, and she might have been exposed to hurtful incidents, if she had waited until third parties had become entangled as bidders, or otherwise.

It is very possible that she might have insisted by petition on being made a party in the foreclosure suit, but if she might, she was not bound to adopt that course. She was at liberty, on being left out, to elect her separate remedy. If any doubt of her ability to institute and carry

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on legal proceedings for the vindication and protection of the homestead could have been entertained in the absence of legislation directed to that subject, there can be no question now. The third section of the act of 1855 (*Comp. L. 1871*, § *4805*), has placed the right of the married woman to sue in such cases upon a level with her right to prosecute in relation to her sole property.

Upon the whole, then, we reach the conclusion that the complainant has made out a case for relief, and we think she is entitled to have a homestead set apart to her as against the mortgages and alienations set up by the defendants, and which they claim to be repugnant to, or inconsistent with her right.

The decree below must be reversed and one entered in this court declaring the complainant entitled to her homestead on the northwest quarter of section twenty, before mentioned, as against the rights and interests given by the mortgages and alienations set up in opposition to her claim; and it must be referred to a circuit court commissioner of St. Clair county to cause such homestead, not exceeding one thousand five hundred dollars in value and forty acres in quantity, to be surveyed and set apart in the manner provided by the statute.—*Comp. L. 1871*, § *6140*. The cause must be remanded to the circuit court for the county of St. Clair in chancery for the execution of the decree, and the costs of complainant in this court and in the court below, and including the costs and expense attending the survey and setting apart the homestead, must be borne by the defendants, Joseph B. and Abiathar W. Comstock.

The other Justices concurred.

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Emanuel H. Van Baalen v. Horace M. Dean and others.

Replevin: Possession: Title in third person: Trespassers. One from whom chattels have been taken by mere trespassers while he was in peaceable possession and holding subject to claims of persons other than the defendants, can maintain replevin.

Possession: Strangers: Outstanding title. One in the sole and peaceable possession of goods, not as an intruder, trespasser or wrong-doer, but as owner, either of the whole, or some special property in them, has a valid title as against all mere strangers, which they cannot defeat by showing an outstanding title in some third party.

Replevin: Evidence. In an action of replevin parol evidence that at the time the goods were taken from the plaintiff he was served with an attachment against a third person and in favor of the defendants, without any proof of the process or proceedings in attachment, is insufficient to prove that the goods were in the custody of the law when the replevin suit was brought.

Question of fact. Under the evidence in this case the question whether the plaintiff's brother was part owner with him of the property, was one of fact for the jury, and it was error, therefore, for the court to determine it.

Heard April 11. Decided April 28.

Error to Wayne Circuit.

Trowbridge & Atkinson, for plaintiff in error.

Moore & Griffin, for defendants in error.

GRAVES, J.

The plaintiff sued the defendants in replevin before a justice of the peace and recovered.

The defendants then appealed to the circuit court, where the jury, under express instruction so to do, found in their favor; and judgment having been entered on the verdict, the plaintiff now asks a revision of the proceedings on writ of error and bill of exceptions. If the evidence tended to make out a *prima facie* case for him, the result was wrong. If it came short of that, it was correct. The articles in dispute were pictures, gilt frames, a mirror, a marble slab, and curtain cords and hooks.

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The case went to the jury on the sole testimony of the plaintiff, and he testified in substance that the articles were in his possession in his dwelling house in Detroit; that the defendants entered his store and inquired for the goods, and then passed up stairs where he lived, and took them away, whereupon he replevied them in this case. He also testified that at the time of the taking the defendants served upon *him* a writ of attachment in their favor against *George Gifford*; that he purchased these articles of Mrs. Gifford, and made the purchase in his business of dealing in second-hand clothing and furniture; that his brother was, and had been for two years, a partner with him in this business, and that the property was paid for out of the partnership funds, but that these goods were separated from others bought of Mrs. Gifford, and sent up stairs into his dwelling, and were mostly intended for his own use; that since the institution of this suit he had sold the pictures in the course of his business, but had kept the remaining articles in his house; that his dwelling was unconnected with the partnership, and was his own. He further stated that the goods were bought by him of Mrs. Gifford at her residence in Detroit, where she had been living with her husband, and that he supposed she was married, and understood she was about to join her husband, who had gone away a few days before.

Upon this evidence the defendants in error claim, *first*, that replevin was not maintainable because the goods were in the custody of the law under an attachment against George Gifford; *second*, that the plaintiff failed to show title in himself; and, *third*, that he failed to show his right to possession, because, if he had any right, it was a joint one with his brother.

I think the evidence tended to make out a complete cause of action in the plaintiff and did not involve any thing which was necessarily sufficient to defeat it. The defendants are not shown to have had any right whatever to intermeddle with his possession, or, indeed, to interfere with

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the goods as against any one. For aught that appears, they were mere trespassers, and not only in no situation to question his right, but were without authority to meddle with the goods, even if they still belonged to Mr. Gifford.

The process against Gifford, which the plaintiff says was served upon himself, was not put in evidence, and no proof of any kind was made of attachment proceedings against Gifford. There is not even oral evidence of the steps in an attachment case, or of any levy, or of the existence of proceedings which could have authorized one. There is, therefore, no room for any question founded upon the existence of such proceedings. If it was competent for the defendants in the position they held to defend upon the ground that the plaintiff's brother was part owner, it was still a question for the jury on the facts shown, under suitable instructions, whether the brother was or was not such part owner, and not a matter to be ruled by the court. The evidence favoring the defendants' view upon that point was very far from being conclusive, and no reasonable construction would warrant a refusal to submit it to the jury if considered competent by way of defense. We have seen, however, that the court did not allow the jury to pass upon the point at all. But it appears to me that in the apparent situation of the parties, and upon the facts as disclosed in the bill of exceptions, there was no foundation for the suggested defense, and for two reasons: *First*, the plaintiff was in actual possession, either as absolute owner, or as one peaceably holding subject to claims of persons other than the defendants. If he held in the first mode, his right was unquestionable. If he held in the second, he had a special property (*Broom's Com., 802*), and was entitled by such possession and property to maintain as against the defendants, who showed no right at all to the possessory remedy given by replevin. *Second*, I think it may be laid down as a rule of law that where one is in the sole and peaceable possession of goods, not as an intruder, trespasser, or wrong-doer, but *as* owner, either of

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the whole property in them or of some special property, he has a valid title as against all mere strangers; and that any one who, without any right or title, takes them away from him is a wrong-doer, and cannot retain his grasp and preclude a recovery of the possession by showing a possible or actual outstanding right or interest in some third party. —*Broom's Com., 801–802.*

If correct in this view, it follows that the court erred in directing a verdict for the defendants, and that the judgment should be set aside, with costs, and a new trial ordered.

The other Justices concurred.

Simeon Folsom and another v. Emanuel Teichner.

Dissolution of attachment. In proceedings before a circuit court commissioner under the statute (*Comp. L. 1871, §§ 6429-31*) for the dissolution of an attachment issued upon an affidavit that "the plaintiff has good reason to believe that the defendant has absconded from the state," etc., a showing that the defendant had not, in fact, absconded, will authorize an order of dissolution, notwithstanding the plaintiff had good reason to believe to the contrary.

Dissolution of attachment: Statute construed. The provision of the statute (*Comp. L. 1871, § 6430*), that if the commissioner "shall be satisfied that such plaintiff has not a good and legal cause for suing out the writ," he may order the attachment dissolved, etc., refers to the state of facts made to appear at the hearing before him, and not what appeared to the plaintiff when the affidavit was made; and the "good and legal cause" must be one existing in fact and not merely in the belief of the plaintiff, however well founded that belief may have appeared to him to be.

Heard April 12. Decided April 22.

Certiorari to circuit court commissioner for Wayne county.

Ward & Palmer and *C. I. Walker*, for plaintiffs in *certiorari.*

Moore & Griffin, for defendant in *certiorari.*

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CHRISTIANCY, CH. J.

The only question in this case arises upon the affidavit annexed to a writ of attachment issued from the circuit court for the county of Wayne.

The affidavit, after stating the indebtedness in due form, states that the plaintiff has good reason to believe, that the defendant has absconded from the state, to the injury of his creditors. This was in compliance with *section 2 of chapter 114 of the Revised Statutes of 1846*, (*Comp. L. 1871*, § *6398*), sub-division "first," and was sufficient to entitle the plaintiff to the writ in the first instance, and to warrant the seizure of defendant's property under it.

But the defendant in attachment applied in due form to a circuit court commissioner, under the act of April 7, 1851 (*Comp. L.*, §§ *6428–31*), for a dissolution of the attachment, the plaintiff being cited to show cause why the attachment should not be dissolved and the property attached restored to the defendant.

The commissioner upon the hearing found that the defendant had not absconded, but that the plaintiff, at the time of making the affidavit, had good reason to believe that he had.

The commissioner dissolved the attachment, and the plaintiff has brought the proceeding before us by *certiorari*, his counsel insisting that the fact found, that the plaintiff had good reason to believe the defendant had absconded, was sufficient, not only to warrant the issuing of the writ and seizure of the property, but to maintain the writ and hold the property, though the defendant had not absconded, in fact.

This argument assumes, and the plaintiff's counsel frankly admits it, that notwithstanding the plaintiff had good reason to believe the defendant had absconded, yet that the plaintiff was mistaken, the inference that he had absconded was false, and if the plaintiff had known the facts as they really were, he could not have made the affidavit, or

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obtained the writ. Shall his own mistake as to the facts give him a right to maintain the writ, when, if he had known the facts and stated them according to the truth, he would not have been entitled to it?

This, if we are to give effect to the substance and intention, rather than the mere form of legislative enactments, would seem to involve a singular inconsistency.

But the plaintiff's counsel relies upon the language of a part of the third section of the act of 1851, in reference to the dissolution of attachments, that, "if said judge or commissioner shall be satisfied that such plaintiff *has* not a good and legal cause for suing out such writ," he may order the attachment dissolved, etc. This, he insists, implies that if the plaintiff *had*, when the writ was issued, a good cause for suing it out, it is not to be dissolved. But this language, "has not a good and legal cause," etc., understood in its strictly literal sense, and, without reference to other portions, and the obvious purpose of the act, can hardly be said to involve this particular implication; and when considered with reference to all the other provisions of the act and the obvious purposes of the remedy provided by it, it is clear, we think, beyond all controversy, that this language refers to the state of facts made to appear at the hearing before the commissioner, and that the "good legal cause," which alone can sustain the writ on such hearing, must be a cause existing in fact, and not merely in the belief of the plaintiff, however well founded that belief may have appeared to him to be. This, we think, is the fair literal meaning of the words.

This point was in effect so decided by this court in *Hyde v. Nelson, 11 Mich., 353.* And though this precise question was not necessarily involved in the decision in *Macumber v. Beam, 23 Mich., 396,*—what was there said being rather by way of illustration only, and, therefore, as plaintiff's counsel very properly treated it, of no binding authority as a decision; still we are all of opinion that the

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views there expressed give a true exposition of the statutes in question.

We see no error in the proceedings before the commissioner, and those proceedings must be affirmed, with costs to defendant in error in this court.

The other Justices concurred.

Ella McSloy v. Michael Ryan.

Landlord and tenant: Possession of land: Notice: Service. The notice to pay rent or surrender possession, required by the statute (*Comp. L. 1871*, § *6706*), providing for summary proceedings to recover the possession of land, may be served by delivery on the premises, to a member of the tenant's family, of suitable age and discretion, with a request to deliver the same to such tenant.

Evidence: Rent due: Offset: Recoupment. In proceedings under this statute evidence of the landlord's breach of covenants to repair and make improvements, which are independent of the covenant to pay rent, is irrelevant; this proceeding is not one in which, even if the amount of the rent due be in issue, there can be any deduction of offsets, or by way of recoupment.

Landlord and tenant: Possession of land: Rent: Demand: Res adjudicata. The issue involved in these proceedings embraces the questions both of rent over due and of a proper written demand of payment or possession; and the rent over due is that due when the demand is made; and any subsequent case that is tried on a new demand is for a cause that originates with that demand, and is a different cause from any prior one based upon a former demand; and a verdict and judgment in the tenant's favor on such prior cause is not conclusive on the question of rent over due, in the absence of any showing that such verdict was based upon a conclusion that no rent was due, notwithstanding the new demand was made before any additional rent had fallen due after the former trial.

Possession of land: Amount of rent due: Judgment: Statute construed. Upon the trial in these cases in the circuit, on appeal, it is not requisite that there should be a finding of the amount of rent due; the provisions of the statute (*Comp. L. 1871*, § *6710*), requiring this finding, as well as those providing (§ *6719*) "that no writ of restitution shall issue if the defendant shall, within five days after final judgment, pay the amount so found due" and double costs, do not apply to the trial on an appeal; the appeal is allowed only from the "determination or judgment" of the commissioner, and the finding of the amount due, though to be stated in the judgment, is in fact no part of it.

Heard April 12. Decided April 22.

Error to Wayne Circuit.

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McSLOY v. RYAN.

George H. Prentis and *Wilkinson & Post*, for plaintiff in error.

George H. Penniman and *Moore & Griffin*, for defendant in error.

COOLEY, J.

Ryan, who was landlord of McSloy in respect to certain premises in the township of Hamtramck, took proceedings before a circuit court commissioner to dispossess her, on the ground of neglect and refusal to pay rent which had become due, or to surrender possession for fourteen days after demand thereof. The case was tried with a jury, January 18th, 1871, and the jury returned a verdict of guilty, and that there was due for rent from December 1st, 1870, to the day of trial, the sum of eighty dollars. McSloy appealed to the circuit court, giving the usual security.

On the trial in the circuit court the lease was put in evidence. The term was four years from the first day of May, 1870, at an annual rent of six hundred dollars, the rent for the first four months to be paid in advance, and after that monthly in advance. Ryan by the lease covenanted to make certain repairs and improvements.

The notice to pay the rent or surrender possession was not served on the defendant personally, but the witness who served it testified to going to the premises for the purpose, and to seeing the defendant in the hall, who closed the door before he reached it, and that he then went into a bar-room, which would appear to have been under the same roof, and there delivered the written notice to defendant's sister, who was then a member of the family, and asked her to deliver it to defendant. No question is made but that this sister was of suitable age and discretion, and we find no error in the action of the court in holding the service sufficient, or in any of its rulings in respect thereto.

The defendant offered evidence to show that complainant had not performed his covenants in the lease in regard

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to improvements and repairs. As these covenants were independent of the covenant to pay rent, and this proceeding was not one in which, even if the amount of the rent was in issue, there could be any deduction of offsets, or by way of recoupment, the court did not err in rejecting this evidence.

The defendant put in evidence the proceedings on a prior complaint by Ryan to obtain from defendant the possession of the same premises on the same ground of non-payment of rent, which case was tried by jury, on December 3, 1870, twenty-seven days before the present suit was commenced, and resulted in a verdict for defendant. And she claimed that, as no rent fell due between the day of that trial and the day of the commencement of this suit, the verdict and judgment in that case were conclusive in her favor, that no rent was over-due at the time last named, or at least that none was due when the first proceeding was commenced. The circuit court held otherwise, and we think correctly. That rent is over-due, is not the only question involved in these cases; a proper written demand of payment or possession must be made the requisite time before complaint is made; and we cannot know from any thing that appears in the record whether the jury in the first case based their verdict upon a conclusion that no rent was due, or on a failure of complainant to prove the proper demand. Besides, the rent over due for which proceedings are taken is that due when the demand is made; and any subsequent case that is tried on a new demand is for a cause which originates with that demand, and which, therefore, is necessarily a different cause from any before passed upon.

The principal question in the case was whether, under the statute, it was requisite that the jury in the circuit court should make a finding of the amount of rent due. The circuit judge held it not needful, and they returned merely the general verdict of guilty.

The statute which prescribes the proceedings before the

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commissioner, provides (*Comp. L. 1871, § 6710*) that if it is claimed that complainant is entitled to the possession of the premises in consequence of the non-payment of any sum of money due, either as rent or as part or portion of the purchase money of the premises under a contract in writing for the purchase thereof, the officer or the jury, if the case is tried by jury, shall ascertain and determine the amount due the complainant, and such amount shall be stated in the judgment. *Section 6717* provides that the complainant obtaining restitution shall be entitled to an action of trespass or trespass on the case against the defendant, and may recover treble damages from the time of notice to quit or demand of possession, and all other damages to which he may be entitled. *Section 6718* gives either party a right of appeal, but declares that before defendant's appeal shall be allowed he shall, in addition to the usual recognizance given on appeals from justices of the peace, execute to the complainant a bond in a penalty not less than twice the annual rent of the premises in dispute, conditioned that if the complainant obtain restitution of the premises in said suit, the defendant will forthwith pay all the rent due or to become due the complainant for the premises described in the complaint up to the time the complainant shall obtain possession thereof, together with all costs; and if the complainant obtain restitution, he may at his election sue and recover on the bond, or bring his action against the defendant under section 6717. *Section 6719* is as follows: "No writ of restitution shall be issued under the provisions of this chapter until the expiration of five days after the entry of judgment of restitution; and in case of an appeal within that time, no writ of restitution shall be issued until such appeal be determined in the circuit court; and in case it is found that the complainant is entitled to the possession of the premises in consequence of the non-payment of a sum of money, no writ of restitution shall issue if the defendant shall, within five days after final judgment, pay the amount so found

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due, and double the amount of costs awarded to the said complainant." *Section 6720* provides that "if upon the trial of an appeal in the circuit court judgment be rendered in favor of either party for costs, the circuit court may issue execution for such costs; and if the complainant shall recover judgment for restitution of the premises in question, or any part thereof, the circuit court may issue a writ of possession in favor of the complainant, in accordance with such judgment of restitution." The next two sections provide for the removal of a case from the commissioner into the circuit court by *certiorari;* the defendant, if plaintiff in error, being required to give a bond similar to that in case of appeal, and the landlord being allowed the like election to sue on the bond or bring his action of trespass, in case the final judgment is in his favor.

These are the provisions of statute on which the question arises, and it must be confessed that it is not very clear whether it is intended that in the circuit court the amount due shall be found by the judgment. Generally it is true, that an appeal takes a case up to be tried on the same issues and to the same purposes and end that a trial was had below; and perhaps in any case it is to be presumed that such a trial in the appellate court is intended, unless specific provisions to the contrary are made. But there may be cases in which reasons exist for varying the proceedings in the appellate court; and it is possible that proceedings under this statute may have been considered by the legislature as cases of this nature. Before the commissioner these proceedings are very summary, and may generally be pushed to a very speedy conclusion; and as cases will sometimes occur in which honest differences will exist as to whether any thing is due, the permission to defendant to pay what is found against him, but under a penalty of double costs, would seem, in view of the summary character of the proceedings, to be not unjust to either party. When, however, the case is appealed to the

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circuit court, the reasons for giving defendant permission to make payment after a verdict against him, are not so urgent or forcible. In that court the case cannot be pushed to such speedy conclusion, and even in cases where the defendant believes nothing to be owing by him, he has had one opportunity of knowing what the evidence was against him, and is not likely to be taken entirely by surprise at the trial, or to be unprepared for an immediate dispossession after judgment, as he might have been when proceedings were first commenced. These considerations may possibly have had weight with the legislature in prescribing what the proceedings should be on appeal; and though by no means very conclusive, they may properly be borne in mind in considering the various provisions of the statute which have been made for the case.

An examination of these provisions will show that we are not at liberty to infer that those which apply to the proceedings before the commissioner were to regulate wholly the action of the circuit court also. On the contrary, express provision is made for judgment, costs, execution and writ of possession in that court; and the omission to make reference to any finding upon the amount due is consequently very significant, and affords very strong evidence of the legislative intent that the privilege which was given the tenant in the court below, of being left in possession on payment merely of what was due when proceedings were commenced, could not justly be left open to his acceptance after such lapse of time as must necessarily attend an appeal, and when other instalments may have fallen due and been left unpaid. And this evidence is particularly strong in view of the unqualified terms in which authority is given the circuit court to issue writ of possession to the complainant obtaining judgment, and which is made subject to no restriction or qualification whatever. It is probably the view of the legislature that the delays of the appeal would of themselves to some extent answer the purpose of the privilege given before the com-

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missioner; and as only the defendant would appeal in a case where the judgment was such as to give this privilege, he would do so with the distinct understanding that he had his election to pay the amount reported due, and retain the premises, or to take his chances of being able to satisfy the appellate court that there was no cause for proceeding against him at all. We assume that the complainant would not appeal from a judgment in his own favor, from a dissatisfaction with the amount found due, even if he had a right to do so, because the finding of this special tribunal, which has no power to try common-law issues, could not be binding upon him in a suit for rent; but if the amount of rent is not to be passed upon in the circuit court, dissatisfaction with the award before the commissioner, could not be the subject of appeal; and this would seem to be the view of the legislature, for the appeal is allowed only from the "determination or judgment" of the commissioner; and the finding of the amount due, though to be stated in the judgment, is in fact no part of it.

It follows from what has been said that the judgment should be affirmed, with costs.

The other Justices concurred.

The People on the relation of Alonzo M. Keeler v. George W. Robertson.

Quo warranto: Office: Election: Tie: Drawing lots. A trial by lot under the statute (*Comp. L. 1871, § 136*) providing for drawing lots for office in case it appears from the legal canvass of votes that two or more persons have received an equal number of votes, and that a failure to elect is caused thereby, does not preclude the inquiry by the attorney general, on the relation of the losing party in the drawing, into the legality of the votes counted by the board of canvassers for the respondent.

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KEELER v. ROBERTSON.

Drawing lots for office: Statute construed: Filling vacancies: Constitutional law. This statute cannot be construed as a regulation under the power granted to the legislature by the constitution (*Art. III.*, § 37), to declare and fill vacancies; it applies to cases where no vacancy in fact exists; and the power given is subject to an express qualification excluding its exercise in cases where the constitution makes provision for filling vacancies; and such provision is made (*Const., Art. X.*, § 5) in the case of registers of deeds.

Statute construed: Drawing lots: Certificate. The terms of the statute, when fairly considered, do not manifest an intent that the result reached by the board of canvassers, when followed by a formal drawing, shall be conclusive upon the candidates and the public; and the effect to be given to a certificate granted under this statute is no greater than that which is given to a certificate of election in other cases.—CAMPBELL, J., dissenting.

Quo warranto: Practice in supreme court: Issues sent down for trial. Where an issue under proceedings in the nature of a *quo warranto* has been sent down for trial, the case remains throughout as an original cause in the supreme court, and the verdict and proceedings on the trial, when certified up, will be subject to the same rules as apply in any court when judgment is moved for on a *nisi prius* record.

Office: Quo warranto: Burden of proof: Title: Relator: Respondent. In such proceedings the burden is on the respondent to justify his own title,—that of the relator being a collateral issue; and a judgment of ouster will be rendered against a respondent who shows no title, whether the relator's title prevails or not.

Verdict: Rules of construction. The whole verdict of a jury must be construed together, and general findings or conclusions inconsistent with special findings will be disregarded as wrong conclusions upon facts found.

Verdict: Pleadings: Judge's notes. A verdict must always be read in the light of the pleadings, and when it refers to documents annexed to it, they must be regarded as incorporated in it; and if not annexed, the verdict may be aided by the judge's notes, where they will suffice for that purpose.

County canvass: Returns. When the right of a respondent is referred by a verdict entirely to the county canvass, and the verdict finds facts which invalidate the returns on which it was founded, the canvass is thereby prevented from being conclusive.

Office: Title: Ballots: Returns: Evidence. The ultimate determination of a right to an elective county office is by the ballots themselves. But the law makes certain official counts and returns presumptive evidence of the number of votes cast, and such official counts will prevail, if lawfully and regularly made, until overthrown by count of the ballots.

Ballots: Official count: Evidence: Certificate. But an official count not legally made is void, and can neither be received in evidence, nor made the ground of an official certificate or return.

Elections: Statute construed: Counting of ballots. The only official count of ballots permitted by the election laws must be made publicly and the result announced publicly when the statements have been examined and the count completed, immediately after the closing of the polls. This result is the only one which can lawfully be certified, and the ballots must be sealed up as soon as the count is closed and the result determined and published. It is unlawful thereafter to open the ballot-box, except under the direction of the court upon a trial, and any other opening or count based thereon will be illegal for all purposes.

Public announcement of result: Certificate: Subsequent recount. The public declaration of the count is an official act and will prevail over any statement or certificate founded upon a subsequent and unlawful recounting.

Ballots: Slips. Where a slip is pasted over a name so as to partially obliterate it, the slip should be counted.

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KEELER v. ROBERTSON.

Contested elections: Evidence: Ballots. Where a contest arises upon an election, the most satisfactory evidence should be produced, and the course taken in this case, of not resorting to the ballots, was commented on.

Heard on demurrer April 15. Decided April 22. Heard on verdict July 18. Decided July 22.

Information in the nature of a *quo warranto.*

Byron D. Ball, Attorney General, for the People.

Edgar Weeks, E. W. Meddaugh and *A. B. Maynard,* for the relator.

R. P. & J. B. Eldredge, Hubbard & Crocker and *A. C. Baldwin,* for the respondent.

GRAVES, J.

This is an information brought to try the right to the office of register of deeds for Macomb county.

By his plea the respondent set up that at the late general election, himself and the relator were opposing candidates for the office; that four thousand eight hundred and ninety-seven votes were cast for it, of which nearly the whole number were equally divided between them by the actual count and determination of the board of county canvassers, and that thereupon lots were drawn by relator and respondent, in which proceeding the latter won and was furnished with a certificate of election. The plea assumed to detail the proceedings at length, but they need not be recited here. The relator filed a replication to the plea, and asked that certain issues said to be involved should be sent down to some proper county for trial. The suggested issues, looked to an inquiry into the legality of votes counted by the board of canvassers on the side of respondent. The latter demurred to the replication, and insisted that by the law of the state the canvass and proceeding by the board, with the decision by lot and the certificate awarded to him, were and are conclusive, and exclude all inquiry into the validity of the votes cast.

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The question thus raised is important, and has received deliberate attention. The law which provides for drawing lots by competitors for office, declares "that whenever in elections of members of the state legislature, or county officers, it *shall appear*, on the legal canvass of the votes, that two or more persons have received an equal number of votes, and that a failure to elect to any office is caused thereby, such persons shall draw lots for election to such office in the manner following," etc.—*Comp. L., 1871, § 136.*

The course to be pursued by drawing slips marked "elected" and "not elected," is then pointed out, and the act proceeds to declare "that any person drawing a slip in which is written the word 'elected' shall be *deemed legally elected* to the office in question; and the officer conducting such drawing shall forthwith give him a certificate of such election." The remaining portions are unimportant to the present inquiry.

The respondent was understood as arguing that the relator having participated in the drawing, and having lost, he ought to be precluded from going behind that process and the canvass. That the trial by lot being admissible only when the votes are found to be equally divided, his engaging in the drawing ought to estop him from asserting that the lawful votes were not so divided. He was further understood as insisting that the legislature being authorized by the constitution to declare when an office shall be deemed vacant, and also the manner of filling the vacancy, the law for drawing lots is to be considered as a regulation on that subject, and as contemplating the office as vacant in case of an equal division of votes, and as giving a method for filling it.

The relator's position was understood to be, that the drawing was intended to go no further as respects the right to investigate the legality of the election than to place the successful candidate in the same situation he would occupy if holding a certificate of election issued upon a count terminating in his favor.

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Whatever opinion may be entertained by different gentlemen as to the mere personal propriety of going back to contest the validity of an election, by one who has actually engaged in a drawing and lost, it appears to me that when an information is filed by the attorney general to inquire for the public into the right, though on the relation of the losing party in the drawing, it is not admissible to say that the inquiry shall be closed in consequence of the relator's connection with that drawing. The office is created for the public advantage, and not to provide emolument for an individual, or to be owned and dealt with as mere private property. One, it is true, may be lawfully entitled to fill it, and have a valid right to its fruits. He may have a title which will exclude the legal claims of others; but his relation to the place as a candidate or aspirant is not such as to overbear the public right or such as to so far identify him with that right or clothe him with a capacity to represent it that his personal doings in a trial of chance under the statute will foreclose the state.

The primary and general right must remain paramount, and until some agency duly representing it and competent to bind it, has intervened in a way to preclude investigation, the course of judicial inquiry must continue open.

The second ground advanced by the respondent is next to be considered. That ground is, as before stated, that the canvass and drawing constitute in the given case an operation in view of the statute where a vacancy is ascertained and filled.

In the first place it must be noticed that the law necessarily applies to cases where no vacancy in fact exists, and where the winning candidate can find no place open to him at the time. The lot is to take place whenever an equal division of votes appears, and is to be made soon after the election and immediately after the canvass. It applies to general elections and elections for full terms. And these terms commence on the first day of January next after the election, and not earlier, and the old

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officer is therefore in when the drawing occurs, and his term will go on until the end of the year. The person, then, who draws the office for a regular term cannot be entitled to enter and hold until some time afterwards, as the office is then full. Again, the language of the act is not appropriate to any such design, and neither the nature of the thing, nor the course of legislation favors the idea that the act was meant to be a regulation under the power to declare vacancies and fill them. No other result is permissible without imputing very gross absurdity to legislation. Specific regulations of a different kind are made for filling vacancies. And a number of acts have been passed at different times expressly directed to the subject of vacancies and the way of filling them.

By *section 582, Comp. L.*, it is expressly provided that in case of a vacancy in the office of register of deeds his deputy shall perform the duties of his office during the continuance of such vacancy; and the next section provides that when there is no deputy, or he is unable to perform the duties, the judge of the circuit court or county judge may appoint for the time being. These citations are made not to show that the regulations are valid or otherwise, but to show what the legislation has in fact been on the subject. We see here that the legislature really acted upon the subject, and we notice that in doing so express reference is made to the existence of a vacancy. The meaning is not left to a doubtful or unnatural implication.

Chapter eleven of the Compiled Laws is also expressly applicable to vacancies and the mode of filling them. Indeed, the specific regulations on this subject are numerous, and they manifest that the act for drawing lots could not have been intended to cover any part of the same object.

But the argument supposes this statute to be in subservience to the before-mentioned constitutional provision, and it may be well to see, therefore, whether that provision was meant to allow the legislature to fill a vacancy in the office

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of register of deeds in this way. It is in these terms: "The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution."—*Const., Art. III.*, § 37.

We observe that the power given by this particular section is subject to a qualification plainly stated in the section itself, and that such qualification excludes the power in cases where the constitution makes provision for filling vacancies. If, then, we find a provision elsewhere in the constitution for filling a vacancy in the office of register of deeds, it cannot be said that the power to regulate that subject resides in this clause. And there is such other provision.

Section 3 of Article X. declares that "In each organized county there shall be * * a register of deeds, * * *chosen* by the *electors* thereof once in two years, *and as often as vacancies shall happen*," etc.

It is, therefore, obvious that the law for drawing lots cannot safely be referred to any such theory as that insisted on by the respondent. The clause in the constitution on which that theory is made to rest, will not bear the construction which the theory requires.

Is the law rightly subject to any other view which will make it operate so as to shut out a judicial investigation of the legality of the proceedings prior to the canvass and drawing? If it is, it must be because the terms used, when fairly considered, manifest an intent that the result reached by the board of canvassers, when followed by a formal drawing, shall be conclusive upon the candidates, and also upon the public. Is such an intent manifest? In looking at the question we are still to remember that the end aimed at by the institution of these offices is the public benefit, and not the advancement of the personal interests of individual aspirants, and that the choice to such offices as that in question for regular terms belongs primarily to the whole body of legal voters of the county.

The board of canvassers has no authority to go behind

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the statements returned by the election boards, and inquire into the qualifications of the persons whose votes are returned. They have to proceed in making their count, upon the data furnished by the returns or statements, and are compelled to assume that the votes returned as having been given were legal votes. As then the board do not and can not go into the question whether the votes returned were cast by qualified persons, their decision cannot involve or decide that question; and if their decision that the vote is equally divided carries with it a power to decide the result by chance which will conclude all inquiry into the validity of the votes canvassed, then important offices are by law made subject to be filled through illegal votes, against the right of the public, and without the possibility of investigation anywhere or by any lawful means. The simple fact that two or more appear upon the returns to the board of canvassers to have received an equal number of votes, results in completely excluding the public, as well as individuals, from all inquiry into the validity of the votes going to produce such apparent equal division. No matter what irregularities may have actually occurred in the doings by or before the primary election boards, if the papers and records are regular on their face, all investigation is precluded by the circumstance that it appears on a count by the board of canvassers that the vote is equally divided.

Now, it will be admitted that if it appears upon the canvass that any candidate has a greater number of votes by one than any others he is entitled to a certificate of election, and as fully entitled as though he had drawn the winning slip on an apparent equal division of votes. And it will also be admitted that the certificate in such case cannot exclude judicial investigation. If, however, the claimed construction of the statute is correct, a smaller vote by one in the returns for the same place, and followed by a winning cast, will inure to give him the office securely against his competitors and against the people, no matter

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how many fraudulent or illegal votes may have served to swell his side of the list. Yet there is nothing in the nature of the case or in reason or policy which can furnish ground for any such distinction. It is extremely difficult to suppose that the legislature intended any such consequences, and the terms of the law do not compel an interpretation which will produce them.

The drawing is provided for when it "*appears*" on the canvass made pursuant to law, that two or more persons have received an equal number of votes, and that a failure to elect is "*thereby*" caused, and the person who draws the winning slip is, in the language of the act, to be "*deemed legally elected.*" The meaning of this appears to be that when, in consequence of an equal division upon the returns, the board cannot declare in favor of any one, the difficulty shall be settled by chance, so as to allow a certificate to be issued to some one. The act is not worded as we should expect to find it if the legislature had intended to make the result final and conclusive. If a result so far-reaching and unusual had been designed, it is scarcely credible that it would have been left in any uncertainty.

The most natural inference upon the whole is, that the plan adopted was meant to go no further than to give the same effect to a certificate fairly granted to one regularly entitled upon a legal drawing, that belongs to a certificate of election in other cases. Such an inference does no violence to the terms of the act, and, on the other hand, it places the sanctity of the title obtained in such a mode, on a level with one acquired by certificate founded on the apparent larger vote. And it likewise leaves the right of the public to look into the validity of the anterior proceedings, in all its integrity. If this conclusion is well-founded the demurrer must be overruled.

CHRISTIANCY, CH. J., and COOLEY, J., concurred.

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CAMPBELL, J.

I think the language declaring that the person allotted to be the incumbent shall be *deemed* legally elected is too positive to be read as if it said "*presumed.*" There is nothing which would render such a rule unreasonable, and there are many considerations recommending it. At that stage of proceedings no one can know, and certainly the law cannot presume, that there has been a miscount. There is always a presumption that officers have acted fairly, and their count of single ballot-boxes is as likely to be correct as when the votes in a large number are counted before a jury, with no likelihood that a miscount in so large a mass will be defected.

The language should, I think, receive its natural meaning.

An issue having been framed and sent down to the Macomb circuit for trial, the verdict and proceedings were certified to this court, and came on for hearing at the July term, upon a motion by the relator for judgment upon the verdict.

Edgar Weeks and *A. B. Maynard*, for the motion.

R. P. Eldredge and *A. C. Baldwin*, *contra.*

CAMPBELL, J.

This case comes up on motion for judgment on the verdict. It is claimed by each of the parties that the verdict, as it stands, is in his favor.

On the present motion we are confined to the record, and can take no notice of any special rulings on the circuit which might be the ground of moving for a new trial. But the case does not stand before us like a case on error.

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It is an original cause in this court; and we have the trial reported to us with the judge's notes, which enable us to do with it what might be done in any court moved for judgment on a *nisi prius* record.

The difficulties which arise on the verdict are twofold: *first*, a supposed conflict between the general findings and the answers to particular questions; and, *second*, a supposed failure in the special findings to determine any matter which would change the general findings.

If the two findings on the two separate issues, which are the only ones raised on the replication, stood alone, they would be conclusive. They find the only issues laid before the jury, in favor of the respondent. And, as both parties are confined to those issues, this would have ended the controversy, unless a new trial were granted.

But, whether the jury could or could not have been required to find specially on any point, they have done so; and their finding must all be taken together. If there is any thing in the special findings which is so opposed to the general conclusions as to show they could not have been found on the record without contradicting the special findings, then those conclusions must be disregarded, as they would be on a special verdict in the ordinary form. If, on the other hand, they can be reconciled with the special findings, they will be upheld.

It is necessary, therefore, to consider what were the precise issues, and what were the findings. In such cases as the present the pleadings are special, and not general.

The defendant, being called upon to show by what warrant he assumed to exercise this office of register of deeds for Macomb county, was compelled to disclaim, that is, to deny that he held or claimed the office; or else to justify, and show what title he asserted. He set up a title to the office, not as having received a majority of votes, but as having received a tie vote with the relator, which appeared on the canvass of the county, and was followed by a statutory allotment whereby he drew the office.

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Upon the demurrer filed to the replication in this cause, it was held that the canvass was not conclusive, and that the issues presented by the replication might be tried. These both went to a denial of an actual tie, one denying that respondent received the number of votes asserted, and the other denying that respondent received as many votes as the relator. The only issue, therefore, related to whether the returns on which the canvass was made were authentic as to the number of votes cast for both candidates, as the canvass itself was not put in issue, and the proceedings to determine between the claimants under a tie vote were also not impugned.

The findings are in substance as follows:

1. That respondent received the number of votes alleged.

2. That he received as many as relator. These are the general findings.

The special findings are on relator's requests:

1. That in the town of Sterling the inspectors, on the day of election, canvassed the votes, made known the result to the electors present, that result being a majority of one hundred and twenty-one for respondent, sealed up the ballots and closed and secured them in the ballot-boxes, and then separated and went to their own homes, without adjournment.

2. That afterwards, on the 7th day of November, 1872 (the election having been on the 5th), the inspectors met again without previous adjournment, opened the boxes, recounted the votes, and made their return, which was antedated as of November 5th.

3. That a vote was thrown out by the inspectors where a slip for relator had been placed over the name of respondent, and partially obliterated it.

The findings on respondent's requests were:

1. As to how many legal votes respondent received. "We find, according to the county canvass, that is, 2411."

2. As to legal votes for relator. "We find, according to the county canvass, that is, 2411."

They find further a tie and the drawing of lots result-

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ing in favor of respondent, which latter was not in issue on the pleadings, but admitted. As to whether there was any fraud in Sterling they cannot tell.

A preliminary question arises on the extent of the verdict, and also upon the burden of the issue. In these cases the defendant is called upon to justify his title, and if the facts do not show his title, he must be ousted, whether they make out that of the relator or not. The relator's title is a side issue, which is usually passed upon, but not always.—See *People v. Molitor, 23 Mich., 341; People v. Miles, 2 Mich., 348; People v. Connor, 13 Mich., 238.*

In regard to the findings, it is undoubtedly true that they must lead to one result or another, or the verdict will be insufficient.—*People v. Doesburg, 17 Mich., 135.* But a verdict is always to be read in the light of the pleadings; and where it expressly refers to documents before the jury, the omission to recite them at length in the verdict will be supplied, if it can be done by the aid of the judge's notes. In the present case the county canvass and the return of the inspectors of Sterling are both sent up with and annexed to the finding, so certified as to make them documentary evidence, and they must be assumed as being in law a part of the verdict.—*Tidd's Pr., 897, et seq.*

We think the fair construction of the verdict is, that the conclusions of the jury were based on the county canvass, and that they did not regard the transactions in Sterling as affecting its correctness. Upon looking into the report of the judge we find nothing to indicate a different meaning, and every thing to confirm this. We find no evidence of any counting of ballots before the jury, and that the whole controversy was made upon the various countings in that town. As the county canvass was based entirely on the official returns, the only question on this verdict is, whether they have been so affected by the finding as to change the result against respondent.

The election law is positive that the official count of

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the ballots shall be made immediately, in public, and the result ascertained and declared publicly, and an official statement made of the result in duplicate, one to be delivered forthwith to the town clerk, and the other given to the inspector who is to attend the canvass; and the ballots are then to be sealed up and delivered to the clerk, and kept unopened until the next election, subject only to inspection on a contested election.—*Comp. L., p. 116–117.*

This statute is not doubtful. It makes the action of the inspectors final when they have finished their count and sealed up the ballots, all of which the law requires to be done without delay, in public. Every opening of the ballots thereafter, except upon an election contest, when they will be needed in court, is an unlawful act, and cannot be made the basis of official action.

The ballots are primary and the best evidence. Usually, therefore, secondary evidence would be excluded. For purposes of convenience the law has provided that the action of the inspectors, when conforming to the statute, shall stand as presumptive evidence of their contents. But evidence by the count of any one not made officially, and not made in presence and under the eye of a jury, would be hearsay at best. But it would be contrary to public policy to allow any evidence whatever, based upon a counting made in direct violation of law, to be received at all. The object of the statute is to prevent tampering with the ballots, and inasmuch as it would be impossible to determine with certainty whether any fraud had been committed in any unauthorized counting, there can be no propriety in allowing any evidence resting on it.

If there had been no re-counting, the fact that the statement was not made at once would not, perhaps, be very material, inasmuch as defective statements are allowed to be amended.—*Comp. L.*, § 77. But no statement would be valid which was not based on the original count made before the ballots were closed up, and declared publicly when made. This public declaration is as much an offi-

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cial act as the counting of the votes, and should not be made until the statement of the votes is finally concluded upon, so as to leave no further work to be done except putting it in the form of an official certificate.

The verdict, then, read in connection with these documents, shows that in regard to the office in controversy the return does not conform to the first counting, and that the vote for the respondent upon that counting would be less than that for the relator. It also shows that the return, so far as this office is concerned, is based on a counting not official, but unauthorized, and therefore raising no presumption of correctness. In the absence of other proof the official declaration of the result, made on election day, is the only evidence we have of the vote upon register, and upon that the relator must prevail.—*People v. Cicott, 16 Mich., 283.*

The finding in regard to a rejected vote also appears to show that relator should prevail, even if the return had been valid. The slip pasted above respondent's name, so as to partially obliterate it, should have been counted for relator, as it could leave no doubt as to the intent, and could not make a double vote. It came within the principle of the same case.

As we consider relator entitled to the office upon the verdict, we need not consider the rulings further than to say that any review of them would not change the result in favor of respondent.

But we deem it proper to say that when an election is contested upon the votes, there is great impropriety in omitting to introduce the best evidence accessible, which was not done in this case on more than one point.

Judgment must be rendered against the respondent and in favor of the relator, with costs.

The other Justices concurred.

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The People on the relation of John Whitely v. The Common Council of the City of Lansing.

Contract: Grading: Orders: Specific fund: New assessment: Charter of Lansing: Mandamus. Where a contract was made for grading, whereon the contractor was to be paid ninety per cent. on the engineer's estimates as the work progressed (the remainder being payable on completion and acceptance), and received orders drawing interest accordingly, payable only out of a specific fund, and the assessment made therefor was invalid:—

Held, That a new assessment must be made, and that the charter of Lansing contained provision therefor, which could be enforced by *mandamus*.

Estimates: Legislative power: Vested rights: Evidence. Whether the original estimate was conclusive or not, it was not competent for the legislature to enact a statute which should compel the contractor to be bound by a new estimate made without his assent, or to accept less money than he had actually earned. Such new estimate could in no way prejudice his rights, and would not be admissible in evidence for any purpose against him.

Practice in supreme court. An issue was granted to ascertain the amount of the work done, leaving the question of the conclusiveness of the first estimate to be determined on final hearing.

Heard April 15. Decided April 22.

Application for *mandamus*.

D. Johnson, for the relator.

R. C. Dart and *C. A. Kent*, for the respondent.

CAMPBELL, J.

Relator asks a *mandamus* to compel the assessment of a sufficient sum to pay him for what is claimed to be due under a grading contract, made by John Shine with the city of Lansing, upon which orders were issued as the work went on, and have not been fully paid, and relator owns a large amount of them.

The contract was made and the work done under a contract made in 1865, the validity of which does not appear to be disputed by either party. Under the charter of the city, as then existing, all work done was to be paid for out of a special fund to be raised for that purpose, and in cases like the present, it was provided that if upon the

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completion of the work it should appear that more money had been expended in its completion than was estimated in making the assessment, a further assessment might be made to supply the deficiency. This provision is retained in the present revised charter.—See *old charter, L. 1865, p. 451, § 19; new charter, L. 1869, Vol. 3, p. 1359.* And provision is also made for new assesments in lieu of invalid ones.—*L. 1869, Vol. 3, § 27, p. 1359.*

By the terms of the contract orders were to be issued from time to time "upon the estimate of the city engineer, to within ten (10) per cent. of the amount so estimated as the work progresses, and to be issued in full when said grading shall be completed and accepted by the common council." The orders were to draw ten per cent. interest. The work was done, and the orders were issued upon those estimates, and an assessment was made, which was held invalid, so that the orders remained unpaid.

By *act No. 338 of the laws of 1869* a re-assessment was provided for to pay for this specific work, but not for the amount of these orders or estimates. It required a re-sur-survey and re-estimate of the amount of excavation, and provided for an assessment to pay at contract prices and interest for the work as fixed by the new estimate.

This new estimate was made (without the assent of the contractor), and appears to have resulted in reducing the estimate not far from one-half. The city council made provision for paying on the orders which were out, ratably, as much as this new assessment provided, leaving the remainder to be settled by legal or other adjustment. This application is made to obtain the collection of the balance by a further assessment.

As no legislation can be valid which impairs the obligation of a contract, there can be no ground for claiming that the estimate made under the laws of 1869 is of any legal force as concluding the contractor. It is authority for the new assessment, but it could not cut off the right to further payment if it before existed. Whether the

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original estimates on which the orders were based were conclusive, or only presumptively correct, the last one could have no concluding force whatever.

The answer put in by the city contains no special statement of facts, but relies in general terms on the second estimate, and avers it to be correct. But it does not show how much it allowed to have been excavated, nor how far it differed from the former estimate, and we have no means of computing the difference. It is not such an answer as is sufficient to preclude relief, and from its generality it does not show that the facts averred upon the knowledge of any responsible party would prevail to overthrow relator's rights as set up in his application. It is, however, sufficient to put them in issue, as it denies them positively.

We do not think the petition defective in positiveness, inasmuch as it shows a *prima facie* case upon orders which were presumably good, until some averment should be made impeaching them. If the original estimates were conclusive, the answer would not be full enough to present any tangible issue, and the relator might, perhaps, have fixed rights that could not be overcome without some clear showing of fraud or mistake, at least.

But, while this particular question has not been so presented that we should be justified in finally disposing of it without argument, we are not, as at present advised, prepared to consider the engineer's estimates under the contract as final, and we think an issue must be framed and sent down for trial by jury, to determine the exact amount of work done under the contract, the whole amount of orders issued under it, and the difference, if any, between the sum earned and that included in such orders. The second estimate, we think, cannot be admitted in evidence upon these issues.

Upon the completion of the issues they will be sent down to the Ingham circuit for trial.

The other Justices concurred.

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The People v. Winfield Brewer.

Seduction: Evidence: Reputation. On a trial for seducing and debauching an unmarried woman, evidence of the reputation of the prosecutrix for morality and virtue at the time of the trial is inadmissible, as her reputation at that time would be injuriously affected by the offense itself when made known.

Seduction: Evidence: Chastity: Admissions. In such a case evidence of the admission by the prosecutrix of sexual intercourse with another person than defendant is not admissible as proof of the substantive fact; nor is it admissible to prove that she was not a pure-minded woman, but was inclined to lewdness, when not offered in connection with other proofs of a habit of lewd talk and conversation, and when no proper foundation had been laid for its introduction as impeaching testimony.

Privilege of witnesses. A witness put upon the stand in such a case and asked whether he had ever had sexual intercourse with the prosecutrix, has a right to decline to answer; and it is not error for the court to refuse to require him to give the reason for declining, as a valid reason is manifest.

Privilege of witnesses. It is not error for the court to refuse to compel a witness in such a case to answer whether he had not had sexual intercourse with the prosecutrix previous to the alleged offense, notwithstanding any prosecution against him for seduction would be barred by the statute of limitations at the time of the trial, in the absence of any showing that he had not already been complained of, and when a prosecution for rape had not yet been barred.

Charge to the jury: Evidence. The granting of a request to charge as to the effect of the refusal of witnesses to answer such questions, that "the case, so far as those questions and answers are concerned, should stand in the minds of the jury as if the questions had not been asked, or the same as if answered in the negative," though erroneous standing by itself, could work no harm in the absence of any evidence of the fact of such intercourse.

Charge to the jury: Error cured. The erroneous impression which this request might have produced, if given alone, is held to have been cured in this case by the clear, full and positive instructions given in the general charge of the court, which laid down the correct rule in this regard.

Presumption: Chastity. It is not error to charge in such a case, that the law presumes a woman to be chaste until the contrary is shown.

Submitted on briefs April 15. Decided April 22.

Exceptions from Kent Circuit.

Byron D. Ball, Attorney General, for the People.

Eggleston & Kleinhans, for respondent.

COOLEY, J.

The defendant was convicted on an information charging him with having seduced and debauched one Josephine

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Burch. The first error assigned relates to the refusal of the court to allow the defendant to give evidence that the reputation of the complaining witness for morality and virtue in the neighborhood where she resided was bad. Questions were put to several witnesses for the avowed purpose of drawing out such evidence, but in every instance the time inquired about was the time of the trial. It does not, therefore, become necessary for us to consider whether the woman's reputation at the time or previous to the alleged offense could be proved or not, as it is manifest that her reputation in that regard would be injuriously affected by the offense itself when made known, so that if the bad reputation could be made use of by the defense, the very crime would become the means of protecting the criminal, and the more notorious the seduction the more certain would be the immunity from punishment.

The next exception relates to the exclusion of evidence to show that the prosecuting witness had admitted sexual intercourse with another person than the defendant. It was not claimed that such evidence was admissible to establish the fact, but it was insisted that such talk by her would show she was not a pure-minded woman, but was inclined to lewdness. The evidence, however, was not offered in connection with other proofs to show a habit of lewd talk and conversation, but for the inferences which might be drawn from the single fact of the admission, that she was not at the time in the path of virtue. For this purpose we think it was inadmissible. It might, without doubt, have been used as impeaching testimony after the proper foundation had been laid for its introduction; but not as proof of a substantive fact.

The defendant put a witness upon the stand and inquired of him if he had ever had sexual intercourse with Miss Burch. The witness declined to answer, for the reason that it might tend to criminate him, and the court held that he had a right so to decline. Another witness was then asked the same question, who also declined to

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answer. The counsel for defendant then inquired for what reason he declined. But the judge said he had already passed upon that, and refused to require an answer. As a perfectly valid reason for the refusal was manifest, we think no error was committed to defendant's prejudice.

To another witness the question was put whether, previous to the time of the alleged offense, he did not have sexual intercourse with the complaining witness, and the court was asked to compel him to answer, because at the time of the trial any prosecution against him would be barred by the statute of limitations. This would be so if he were charged with seduction, and had not been previously complained of, but not if he were charged with rape. As an affirmative answer might form a link in the chain of testimony to convict him of either offense, no error was committed in the ruling, especially as the court could not know whether the witness had previously been complained of or not.

It is also assigned for error that the court, at the request of the counsel for the people, gave to the jury the following instruction: "When a witness is placed upon the stand and declines answering a question put to him on the claim of privilege, the jury are to draw no inference that the fact inquired after is true or exists; it stands in all respects as if the question had not been asked; that in this case, where the question asked of the witnesses was to the effect of their having had illicit sexual intercourse with the complaining witness, to which they declined to answer, the jury are not to infer that they did have such sexual intercourse with her, and their declining to answer is no evidence whatever of the fact of such sexual intercourse; that no presumptions are raised that the witness had had sexual intercourse, and the case, so far as those questions and answers are concerned, should stand in the minds of the jury the same as if the questions had not been asked, or the same as if answered in the negative." This instruction, standing by itself, would have been clearly erroneous,

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inasmuch as it did not leave the case to stand as if no such questions had been put, but gave the refusal to answer the effect of positive evidence that the fact inquired about did not exist. No mischief would be done even then unless there was evidence in the case from which the contrary inference might be drawn; but in this case it is claimed there was such evidence.

From the record, however, it would seem that acceding to the request in this form must have been an inadvertence, for the judge proceeded to lay down the law to the jury very clearly and very fairly. "Young men," he said, "are put upon the stand and asked if they had intercourse with the girl, and these young men decline to answer on the ground that the answer would tend to criminate them. From this you cannot infer that they had intercourse with the girl. It is a failure of proof as to these witnesses. The court held that the witnesses should not be obliged to answer these questions as to the fact of intercourse, and they did not answer. You are not at liberty to suppose, imagine, or infer what would have been the answer to these questions if they had been given. You must act upon the evidence in the case, and not upon what you suppose or imagine might have been put into the case." This is perfectly clear and perfectly correct, and must have relieved the minds of the jury of any erroneous impressions they might have received from the judge's assent to the previous request, especially as where a written request is thus acceded to, and the same ground is then fully occupied by the judge with instructions in his own language, the latter will always be most likely to receive the strict attention and be impressed upon the minds of the jury.

The last error we shall notice is, that the court erred in instructing the jury that the law presumes a woman to be chaste until the contrary is shown. We believe this instruction to be correct. The presumptions of law should be in accordance with the general fact; and whenever it shall be true of any country, that the women, as a general fact, are

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not chaste, the foundations of civil society will be wholly broken up. Fortunately in our own country an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it. —*Crozier v. People, 1 Park. Cr., 457; People v. Kenyon, 5 Park. Cr., 286; Kenyon v. People, 26 N. Y., 204; Andre v. State, 5 Iowa, 398; People v. Millspaugh, 11 Mich., 238.* The case of *West v. The State, 1 Wis., 217,* which seems to hold otherwise, was decided upon the phraseology of the Wisconsin statute, which was thought to make the "previous chaste character" of the person seduced an ingredient in the offense, to be made out by proofs. Our statute is very simple, and merely provides that, "If any man shall seduce and debauch any unmarried woman the shall be punished," etc.—*Comp. L. 1871, § 7697.*

One other exception is relied upon in the brief, but no reasons are assigned for it, and as none occur to us, we pass it by. It must be certified to the circuit court as the opinion of this court, that the exceptions are not well taken, and that judgment should be given upon the verdict.

The other Justices concurred.

The People on the relation of Patrick Gorman and another v. The Judge of the Newaygo Circuit Court.

Declaration: Amendments: New cause of action: Statute of limitations. A declaration upon the common counts cannot be amended so as to set forth a new and distinct cause of action upon a special contract which has become barred by the statute of limitations since the original declaration was filed; this would be to permit the fiction of relation to nullify an act of the legislature.

Declaration: Different causes of action. A declaration upon the common counts in assumpsit, and one upon a special contract are for distinct and different causes of action, where the basis of recovery under the latter is such that there could be no recovery under the former.

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GORMAN v. JUDGE OF NEWAYGO CIRCUIT.

Declaration: Amendment: Special contract; Plea and notice: Cause of action. The fact that the notice attached to the plea to the original declaration set up as a defense, the same special contract counted upon by the amended declaration could have no tendency to show that the cause of action was the same in both, or that the amendment should have been allowed; on the contrary, the facts set up in the notice being in accord with the new declaration, and at the same time such as, if proved, would preclude a recovery under the common counts, its tendency is the other way.

Heard April 15. Decided April 22.

Application for *mandamus*.

E. L. Gray, for relators.

J. H. Standish and *Fuller & Standish*, for respondent.

CHRISTIANCY, CH. J.

This is an application for a *mandamus* to compel the circuit judge to grant an order striking from the files an amended declaration, in a cause pending in the circuit court for the county of Newaygo, wherein John McNab and John R. Parsons are plaintiffs, and Patrick Gorman and Thomas Gorman defendants.

The original declaration, filed March 10th, 1862, was in assumpsit upon the common counts only. To this declaration defendants, May 17th, 1862, pleaded the general issue, and gave notice, among other things, that they would show under the general issue that plaintiffs and defendants in 1860 entered into a contract by which defendants were to cut a certain quantity of pine saw logs on land to be designated by the plaintiffs and belonging to them, for which labor the plaintiffs were to pay a certain sum, to wit: one thousand dollars when the logs should be delivered; and defendants aver that plaintiffs did not designate the land and furnish the same, whereby defendants were thrown out of employment, and sustained damages which they will recoup, etc. In a further amended notice by defendants, the contract is set out in full, and notice given that they will prove, that if any goods and money were ever advanced by the plaintiffs to defendants, they were advanced upon

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this contract. This contract need not be further noticed than to say, that the plaintiffs could not, under the admitted circumstances of the case, have recovered at all upon the common counts for any of the items of their claims, which, as appears by their subsequent amended declaration, were for cash advanced to defendants under this contract, which remained open and still in force. And the plaintiffs, having become satisfied that they could not recover upon the common counts, on the 26th of September, 1871, when the cause was duly brought on to trial, they voluntarily submitted to a non-suit,—judgment of which and costs was thereupon entered in favor of defendants; and, on the following day, upon motion of the plaintiffs (which was opposed by the defendants), the above judgment of non-suit was set aside and vacated, upon condition that plaintiffs pay defendants their costs of the term, etc., and that the plaintiffs have leave to file an amended declaration, and that they serve a copy of said amended declaration with a copy of their bill of particulars, etc. And on the 27th of November, 1871, this amended declaration and bill of particulars were served.

This declaration is upon the special contract alluded to in the notice of the defendants, and by its averments shows only a cause of action which is separate and distinct from that set forth in the original declaration, and which could not by any evidence have been brought within the common counts. It was, therefore, for a new and separate cause of action. But as it was still in assumpsit, and the form of the action was the same, and the same plea of non-assumpsit would apply, we do not mean to intimate that the amendment might not, in the discretion of the circuit court, have been properly allowed, if seasonably applied for.

But long before this amended declaration was filed, or leave to file it applied for, the statute of limitations had taken effect upon and barred the cause of action set forth in it. Had a new suit been then commenced for the same

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cause of action, it is not pretended that it could have been maintained; and we see no substantial difference between the commencement of a new suit and the allowance of this amended declaration, under these circumstances, for the same cause of action. It is clear enough that the only purpose and object of allowing the amended declaration, instead of putting the plaintiffs to a new action, after they had submitted to a non-suit, was to prevent the statute bar of the action. We do not think the statute can be evaded by any such necromancy; and to permit the shallow fiction of a relation back to the commencement of the suit, under such circumstances, to nullify an act of the legislature, would be discreditable to the judiciary.—See *Wright v. Hart, 44 Penn. St., 454; Trego v. Lewis, 58 Penn. St., 463; Williams v. Randon, 10 Texas, 74; Wilbanks v. Willis, 2 Rich. (S. Ca.), 109; 42 N. H., 70.* We are aware there are some cases the other way, based upon early decisions, made when the statute of limitations was looked upon as a hard and unconscionable defense. But we can recognize no sound principle upon which such decisions can rest. Statutes of limitations are now quite generally looked upon as statutes of repose, and just as essential to the general welfare and the wholesome administration of justice as statutes upon any other subject, and to be construed with the same favor to effect the legislative intent.

It was urged upon the argument that the notice of the special contract set up by the defendants with their plea, tends to show that the cause of action set forth in the amended declaration was the same in substance as that covered by the common counts in the first declaration; but the very purpose of the notice was to show that it was not the same; and if the notice was true (which seems so far to be admitted by the amended declaration), it did show that the cause of action was not the same in the first as in the second declaration. The notice was wholly unnecessary. But, so far from showing that the amended declaration ought to have been allowed at so late a day, its tend-

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ency was directly the other way, as it shows the plaintiffs, in that early stage of the cause, were fully notified of the necessity of a different declaration; and yet they fail to apply for an amendment until the statute of limitations had run.

The amendment was improperly allowed, and the *mandamus* must issue as prayed.

The other Justices concurred.

Harrison W. Smith v. Patrick McGill.

Contract: Evidence: Damages. In an action upon a contract to take and keep a yoke of oxen until a specified time, and to return them at the expiration of the term in as good condition as they then were, without charge for keeping, and to pay for any damages they should sustain, evidence that defendant would not have taken the oxen if he had known their condition as to being well broken, and that one of them had drank lye the previous spring, in the absence of any showing that he had been deceived or defrauded, is inadmissible.

Evidence. In such action it is not error to exclude testimony of defendant's servant as to how other oxen that were treated the same, stood the treatment, where it appears from his own testimony that these oxen were beaten by him in a way and under circumstances that would have justified a criminal prosecution.

Charge to the jury: Evidence. Instructions to the jury based on the assumption that the injury to the cattle may have occurred from exposure after their return, were uncalled for, in the absence of any showing that the exposure was unusual, or that the injuries were of a nature likely to be caused by it.

Damages: Contract. Under such a contract the defendant's responsibility for injuries is absolute and not dependent on the failure to employ due care and diligence; and in the absence of any evidence of fraud he cannot discharge himself from liability for any injury actually received by the cattle while in his hands, on any claim that they were less serviceable to him than he expected they would be, or that they had been injured before he took them.

Heard April 15. Decided April 22.

Error to St. Clair Circuit.

A. E. Chadwick, for plaintiff in error.

O'Brien J. Atkinson and *Trowbridge & Atkinson*, for defendant in error.

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SMITH v. MCGILL.

COOLEY, J.

Smith was sued by McGill in assumpsit for that on or about the first day of November, 1870, in consideration that plaintiff would let him have a certain yoke of oxen to keep until March or April, 1871, at the option of the defendant, he (the defendant) undertook and promised the plaintiff to return the oxen to the plaintiff at the expiration of the term in as good condition as they then were, without charge for keeping, and to pay the plaintiff any damage they might sustain while in defendant's possession. The breach alleged was that the oxen, after being used for a while by defendant, were returned to the plaintiff in a much worse condition than they were in when taken, and that they were greatly injured and deteriorated in value while thus in the possession of defendant, in consequence of which one of said oxen became of no value and died. The contract and the delivery of the oxen under it were proved, and it was shown by the defendant's own evidence, as well as by that on the part of the plaintiff, that his servant, without the least justification or reasonable excuse, subjected the oxen to the most cruel and inhuman beatings, such as would be likely to result in serious injury, if not death. In December, 1870, in the absence of plaintiff from home, defendant returned the oxen, saying one of them was used up. He notified plaintiff's wife of the return, and the oxen were left in the yard, where they had only the shelter of hay and straw stacks. While in defendant's possession they had been kept in the stable. One of them died three weeks after the return. The jury returned a verdict for the plaintiff for one hundred and eighteen dollars.

It is assigned for error that the circuit judge refused to allow the defendant to state, when on the stand as a witness, that if he had known the condition and facts in regard to the oxen, as to one of them having drank lye the previous spring, and as to their being well broken, he would

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not have taken them. The ruling was correct. There was no pretense that he had been deceived or defrauded in the contract, and the only question at issue was whether the injury occurred while the cattle were in his possession.

It is also complained that the court refused to permit one Lewis, defendant's servant, after stating that these oxen were used as well as other oxen, and as well taken care of, to state how the other oxen stood the treatment. Lewis was the person who, as he did not hesitate to state in giving his own testimony, beat the oxen in a way and under circumstances that would have justified criminal proceedings against him; and if other cattle subjected to similar treatment were fortunate enough to escape fatal injury, the fact can have no legitimate bearing upon defendant's liability for the injury to these.

The defendant asked of the circuit judge instructions to the jury based upon an assumption that the injury to the cattle may have occurred from exposure after their return. The judge gave them in a modified form, but we find in the record no evidence which called for any such instructions. It was not shown that the exposure was unusual, or that the injuries were of a nature likely to be caused by it. Some other instructions equally inapplicable to the case were requested, which we do not deem it necessary to examine in detail.

The defendant contended that his undertaking, as set forth in the declaration, only bound him to ordinary care and diligence in protecting the cattle from injury, and that even this was not binding upon him unless the cattle were in condition to be used as contemplated, and defendant at the time of entering into it was fully advised by plaintiff of any thing in their condition important for defendant to know, and the concealment of which by the plaintiff would be bad faith, or which, if the defendant had known it, he would not have made the undertaking at all, or being advised of, might have taken extra precautions not required in an ordinary case. But it is very manifest from the

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terms of the undertaking that defendant's responsibility for injuries was absolute, and not dependent on the failure to employ due care and diligence; and as there was nothing in the evidence which presented for the jury a question of fraud, defendant cannot discharge himself from liability on any claim that the cattle, for any other reason, were less serviceable to him than he had expected they would be. And if in fact one of them, as he claims, had received an injury before he took them, this would not relieve him from liability for any injury actually received by them while in his hands.

We have examined all the errors assigned, and noticed the most important, and we think the judgment should be affirmed, with costs.

The other Justices concurred.

Jason Leonard v. Sarah J. Pope.

Married woman: Slander: Sole action: Marriage: Evidence. A married woman may bring a sole action for slander, and her marriage may be proved by repute. The highest evidence of marriage is not required, where that fact is not a part of the main issue.

Witness: Reputation: Veracity: Evidence. Where a witness is sought to be impeached by proof of general reputation, it must be reputation for veracity; and repute as to honesty is not admissible.

Charge to the jury. It is not error to refuse to repeat, on separate requests, charges already fully given in as intelligible form.

Slander: Evidence: Repetitions: Damages. In actions of slander, evidence may be given of repetitions of the same slander, to enhance the damages. Such repetitions constitute practically one slander, aggravated by the enlarged circulation; and a judgment in such a case is a bar against any further action for any such repetition open to proof on the trial.

Slander. Authorities upon this subject discussed.

Submitted on briefs April 16. Decided April 22.

Error to Oakland Circuit.

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LEONARD v. POPE.

W. B. Jackson and *M. E. Crofoot*, for plaintiff in error.

Patterson & Patterson, for defendant in error.

CAMPBELL, J.

The defendant in error, a married woman, sued plaintiff in error in slander, the declaration setting forth in separate counts two slanderous charges. The first count was for a charge imputing unchastity. The second was for a charge of theft and dishonesty.

It appeared by the proofs that she was the wife of one Edgar Pope. Charges were asked and refused, claiming that she could not recover in this action: *first*, because her husband did not join with her; and, *second*, because the marriage was proved by repute and not by strict proof.

These objections were frivolous. It was decided in *Berger v. Jacobs, 21 Mich. R., 215*, that no joinder of husband and wife is necessary where the wife sues for a personal grievance or cause of action. And there is no authority that has been referred to, or which we are aware of, that requires the highest evidence of marriage in suits not directly involving the marriage relation as a part of the main issue.

It is also alleged as error that the defendant below was not allowed, upon a question of impeachment, to cross-examine a sustaining witness concerning statements in the neighborhood about the honesty of the witness sought to be impeached. This ruling was proper. The question of dishonesty has not been allowed to be considered as an issue upon impeachment. Very likely a man who steals may lie also; but there can be no occasion to enlarge the rule, because he is quite as likely to get such a reputation as he deserves for want of veracity as for want of honesty. And if he has not obtained a bad reputation for truth, it would be a very unreasonable assumption to claim that he ought to have it. The whole doctrine of impeachment,

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although necessary in many cases, is so often resorted to where the local gossip turns out to be unfounded and malicious, that no good purpose would be subserved by opening the door any wider for the reception of such rumors.

The first count in the declaration charged Leonard with asserting that "the Popes (that is, the husband and the father-in-law of defendant in error), are all thieves, and their wives are whores." The evidence was, that in a conversation in which the Popes (father and son), were the subjects of discussion, Leonard said, among other things, "I live right between them, and have known them for years; the men are thieves and their wives are whores, and I can prove it." The charge here, so far as it relates to the plaintiff below, was literally, as well as substantially, identical with the proof, and the objection that the evidence did not support the count is not well taken.

Certain requests were made asking that the jury be instructed that the testimony of witnesses concerning the slander averred in the second count could not be applied to the first; and error is alleged upon their refusal. The court, if they were refused at all, must have refused them as separate charges because sufficiently covered by the charge given, which was much more explicit and intelligible for the same purpose than a charge in the language of the requests would have been.

The only other questions relate to the proof, which was admitted, of several repeated utterances of the same slander set up in the second count. These repetitions, although at different times and to different persons, were almost identical in language, and all related to the same thing.

The court refused to charge in accordance with the following request: "That in determining whether the defendant ever uttered or published the words charged in the declaration, the jury have no right to consider the testimony of any of the witnesses, except that of William Burk, Calvary Richmond, and Melvin D. Guthrie, as the testimony of all the other of the plaintiff's witnesses was only

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offered or received to show malice." And an exception was based on the charge, because it did not exclude these proofs from consideration for the same reason.

The language of the request is open to criticism, as literally asking to have those proofs thrown out entirely, as they all bore upon the same slander. But the object was, undoubtedly, to raise the question how far, and for what purpose, such proofs may be used.

There has been much controversy in different courts and at different times, in relation to the admission of proof of other instances of defamation than those declared on. In some courts the declaration has been required to be very special. In others a much more general form has been allowed. The prevailing doctrine has long been that there should be no straining of any rule beyond reason, and that these cases should, like other actions of tort, be governed by such principles as shall be best calculated to work out substantial justice.

While there is a conflict concerning proof in aggravation, of distinct slanders, there is no considerable authority excluding evidence of any number of repetitions of the same slander. In some cases it is admitted to show malice, and it is said the jury must be cautioned not to give damages for the repetition. In others it is admitted broadly in aggravation of damages. It would be a useless labor to enumerate the many varying decisions.

There has been a great confusion in reasoning, but the idea underlying the better considered cases seems to be, that inasmuch as a separate action will lie for each slander, a plaintiff might multiply actions and get the same damages repeated, if he could use in each case slanders not declared on, by way of aggravation.

There is reason in this. But it is nevertheless manifest that if testimony is allowed to prove malice, its necessary tendency will be to aggravate damages. And some cases, upon this very principle, hold that when a charge is in itself malicious (as most slanderous charges must be), no

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other proof should be allowed to show what is already beyond dispute.

It seems better and more reasonable, if this testimony is admitted at all, to receive it in such a way and on such conditions as will prevent injustice to either party. And we think, where the proof is given of repetitions of the same slander, there is no lack of authority to permit this.

The English cases, where such evidence of repeated slander has been received, allow it to have its full force in the enlargement of the damages. In a suit for a libel in a newspaper, where technically each copy sent to a subscriber is a distinct publication, the extent of the circulation has always been considered in estimating the damages.—*Gathercole v. Miall, 15 M. & W., 319.* The same rule is universal here.—See *Fry v. Bennett, 28 N. Y., 324.* In the case of *Brunswick v. Harmer, 14 Q. B., 185,* where a newspaper had published a libel more than six years before suit, and the case was made out by the purchase of a single copy within the six years, the court refused to confine the damages to the injury arising out of that single publication. In *Defries v. Davis, 7 C. & P., 112, Tindal, C. J.,* held that no evidence could be admitted which showed a separate cause of action, but said, evidence of a repetition of the same slander was admissible. In *Barwell v. Adkins, 1 M. & Gr., 807,* suit was brought on a libelous article in a newspaper, and on the trial the judge allowed proof of a second article published afterwards, re-asserting the same charges, and told the jury to take both paragraphs with them, "and give the plaintiff such damages as they considered he was entitled to under the circumstances." This ruling was maintained by the full bench, although the opinions, very briefly given, do not put it on as broad a ground as the other decisions.

In *Bodwell v. Swan, 3 Pick., 376,* a repetition of the same slander was admitted, and it was held different slanders could not be proved, on the express ground that damages would be given for them if admitted.

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This case implies what is more distinctly declared in some cases in New York, that the repetitions of the same charge are really the same slander, as the multiplied copies of a newspaper libel are the same libel, and that if they embrace the same language set out in the declaration, in whole or in any substantial part, a judgment on that declaration would be a bar to another action for any of those publications made before the suit. In *Root v. Lowndes, 6 Hill, 518, Bronson, J.*, uses this language: "When the plaintiff does not go beyond the words laid in the declaration, I see no reason why he may not show that those words have been spoken on a dozen different occasions, although there may be but one count in the declaration. If the defendant has told twenty persons, at as many different times, that the plaintiff is a thief, it cannot be necessary to insert twenty counts, precisely alike, for the purpose of enabling the plaintiff to prove all the conversations. Allowing the proof can work no injury to the defendant. He is advised by the declaration what words the plaintiff intends to give in evidence; and whether all the different occasions of speaking them are proved or not, the judgment will be a bar to another action."

This same doctrine is further explained and enforced in *Campbell v. Butts, 3 Comst., 174*, and in *Howard v. Sexton, 4 Comst., 157*. And its principle was relied on in *Rockwell v. Brown, 36 N. Y., 207*, where an action for libel was held barred by a judgment in an action for malicious prosecution, where the arrest was made under papers containing the libelous matter.

This principle appears just and sensible, and avoids the difficulty of drawing intangible distinctions, which no jury can appreciate, between allowing testimony of repetition of wrongs to bear upon an important element in a case, and yet not allowing damages except for the original wrongful act independent of the wrong done by the repetition. Such niceties are not to be favored, and should not be introduced where they can be avoided.

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It was only the accident of calling one witness before another that would have prevented any one of the slanders proven, to have stood as the one to which defendant claims the recovery should have been confined. Any one of them would have made out a cause of action under the declaration. A justification of one would have answered them all. A future action for any of them is therefore barred.

The charge of the judge was very fair and temperate, and is not open to any exception.

The judgment must be affirmed, with costs.

The other Justices concurred.

Charles Dennis and another v. The People.

Burglary: Entry: Transom window: Breaking. An entry into a building by raising a transom window attached by hinges above and arranged to fall into the frame by its own weight, when the window was shut into the frame so as to require some force to open it, is a sufficient breaking under our statute (*Comp. L. 1871, § 7565*), punishing the breaking and entering an office, shop, etc., in the night time, etc.

Heard April 16. Decided April 22.

Error to the Recorder's Court of Detroit.

S. Larned and *F. A. Baker*, for plaintiffs in error.

Byron D. Ball, Attorney General, for the People.

GRAVES, J.

The plaintiffs in error were convicted and sentenced in the recorder's court, for breaking and entering a shop in the night time with intent to steal, and for stealing a large amount of goods found there.

The building was entered through a transom window,

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above the door, which was fastened, and the only question in the case is upon an exception to the charge in relation to the breaking. The window closing the opening above the door was attached by hinges above and was arranged to fall into the frame by its weight. It was provided with a spring bolt at the bottom to pass into a mortice in the frame for the purpose of fastening.

It appears from the evidence that during the night in question the window was hanging down but not fastened, and not so far in the frame as to allow the bolt to catch. A witness for the people stated that it was hanging down, but projected out of the frame at the lower edge, from a sixteenth to a quarter of an inch. Upon this evidence the court instructed the jury that in order to convict if they found that the defendants entered through the window, they must be satisfied beyond a reasonable doubt that the window was shut into the frame so as to require some force to open it, and that the defendants shoved it open, and that if the window was open or swinging, the breaking was not proved. The assignment of error is directed to this charge.

I think the instruction was correct in point of law, and that there was evidence to which it might apply. The question was therefore one for the jury upon the interpretation of the testimony, its evidentiary value and weight; and we have no right to revise their action.

The window was above the door and suspended by hinges, and the jury must have found that it was sufficiently closed within the frame to require force to open it, though not as far back in the frame as it was intended to go.

If an entry is effected by raising a trap-door which is kept down merely by its own weight, or by raising a window kept in its place only by pulley weight, instead of its own, or by descending an open chimney, it is admitted to be enough to support the charge of breaking; and I am unable to see any substantial distinction between such cases and one where an entry is effected through a hanging window over a shop door, and which is only designed for

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light above and for ventilation, and is down and kept down by its own weight, and so firmly as to be opened only by the use of some force, and so situated as to make a ladder or something of that kind necessary to reach it for the purpose of passing through it.

I think the judgment should be affirmed.

The other Justices concurred.

Charles Greeley and others v. John Stilson and another.

Trover: Transitory action: Timber: Trespasser. Trover is a transitory action; and an action for the conversion of timber is not made local by being brought against the original trespasser who cut the trees.

Change of venue: Discretion. A motion to change *venue* is discretionary and not subject to review on error.

Value: Opinion: Different markets: Presumption. The value of logs at one place cannot be proved by the opinion of a witness having no knowledge of values there, and showing no facts from which it could be got at as compared with values elsewhere. Knowledge of one market justifies no presumption of knowledge of others.

Conversion: Damages: Value. Defendants who have sold property and are sued for its conversion, are not liable for value beyond what it would have been before, or at the time and place of conversion. Value subsequently and elsewhere is not material.

Timber: License: Statute of frauds. A parol license to cut timber for a fixed price for stumpage is not invalid, and is not covered by the statute of frauds, either as a sale of an interest in lands, or as a sale of chattels; and the licensee is protected by it in regard to all trees cut before revocation.

Charge to the jury: License. It is error to leave it to a jury to determine whether such a transaction is a license or sale. It can be nothing but a license.

Heard April 16 and 17. Decided April 22.

Error to St. Clair Circuit.

A. E. Chadwick, for plaintiffs in error.

O'Brien J. Atkinson and *Trowbridge & Atkinson*, for defendants in error.

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CAMPBELL, J.

Plaintiffs in error were defendants below, and were sued in trover for the conversion of certain logs claimed to have been cut from lands of Stilson & Stevens, in Alpena county. Judgment was recovered against them in the circuit court for St. Clair county.

A motion for change of venue was made in the court below, based upon the ground that all the transactions took place in Alpena county, and on the further ground that defendants had been fraudulently subpœnaed into St. Clair county, and then served with process in this suit. The case had been tried before, but no verdict had been found.

A motion for change of venue is, unless where otherwise provided by law, a matter which rests in discretion, and is not subject to review. A fraudulent use of process may be punished, and relief may be granted, where it is brought in proper time to the notice of the court. But after plea and trial any legal claim to rely upon the misconduct in the service was no longer beyond the ordinary discretion of the court.

But the question was further raised on the trial whether an action of trover for logs cut and carried away from land in Alpena county and sold in that county can be lawfully brought in St. Clair county.

The statute makes actions for trespass on lands, and for injuries to lands, local. Both trespass and waste would come under such a restriction, and there is much force in the claim that the testimony which would be given in those actions would be the same as that in trover for the conversion of the same property, in the most important respects.

A difference has been recognized, however, arising out of the fact that until the timber has become personalty, by being severed from the soil, it is not subject to conversion, and that wherever it may be moved in an unmanufactured form, whether in the same or in another county, a conversion

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may be charged as taking place where it is sold, or otherwise disposed of or appropriated, as well as on the first removal. Treating it as no longer freehold when it has become personalty, the law distinguishes actions for its conversion, from those for the act whereby it became changed from realty, and puts all suits for the wrongful conversion of chattels on a similar footing, and makes them transitory. The distinction is technical, but it seems to be well established. This action, therefore, was legally brought in St. Clair county.

To prove the value of the logs, one of the plaintiffs, John Stilson, was asked what it would be, without having been previously examined as to his means of knowledge. This was objected to, and being admitted, defendants excepted. On cross-examination he said he did not know of any logs being sold for the price mentioned; that he was not delivering any logs that year, and did not know the market price of logs at Alpena that year. He was then allowed, under objection and exception, to state on re-examination that he got at the value from the quality of the timber and the market value of timber at Alpena. Being further asked, under similar objection, what were his means of knowing the value of lumber at Port Huron, Alpena, Saginaw and other places, he answered, by inquiring that year; that his business was getting out saw-logs, and had been for fifteen years, at Port Huron and Saginaw. His means of getting at the value of logs were, that he inquired the price of lumber at Alpena, and he stated he did not know how far Alpena was from Saginaw or Port Huron.

As the defendants sold the logs, they were chargeable for their value at the time and place of sale, but no later; and this value, therefore, was necessary to be shown. When the witness was first sworn he had shown no knowledge of any kind. On his cross-examination he stated explicitly that he did not know the market value of logs at Alpena, and where the conversion relied on is a sale, the value is

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the only admissible test. The price obtained by the defendants would be admissible against them, though not binding in their favor. He does not, on his re-examination, show any knowledge of the value of logs at that point. He does not show that he had any knowledge of the cost of manufacturing at Alpena, nor, if he had, does he show that logs could be sold for the price of lumber less the cost of sawing, or what were the usual sawyer's profits, if any. It cannot be presumed without proof, that a knowledge of one market implies a knowledge of another in logs any more than in other articles. It was held in *Gilbert v. Kennedy, 22 Mich., 117*, that evidence of value in other markets, where the value in the home market was the test, could not be given unless it should also appear how far they operated to affect the home market. In *Powers v. Irish, 23 Mich., 429*, it was recognized as improper to attempt to prove a Chicago value for lumber on the Grand River. And it is impossible to assume, without distinct testimony, that any one can know the value of logs in a particular market without knowing actual prices or estimates in that market. He gives no values or data for getting at any of the elements on which he professed to act, either of the cost of sawing, the value of lumber, or the prices or cost of logs or lumber elsewhere. His testimony, therefore, stood in the case as a basis of recovery, without any showing that his opinion was admissible. The charge did not cure the defect, but left it to the jury with assurances that they might follow it. This testimony should not have been received.

Several errors are alleged upon the charge given by the judge apart from his rulings upon the requests of the various parties, but as this charge is not confined to one subject, but covers a number of independent questions, the single general exception to it is not sufficient to bring it up. The charge can not be examined at all, except as to such parts of it as respond to the specific points presented to him for rulings, or were meant to explain them.

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The principal question open on the charge on which the case appears to have turned, arises on the rulings upon an alleged arrangement whereby defendants below claimed to have cut the timber. Evidence was given tending directly to prove an arrangement whereby Stilson authorized them to cut the timber for one dollar per thousand feet stumpage, which was to be paid over for the plaintiffs to Oldfield & Co. If such an arrangement was made so as to bind Stilson, it is not disputed but what it would be a complete defense. The parties were at issue on the fact.

The bargain, as sworn to by Oren Erskine, was that he was to cut it and have it scaled by Thomas H. Hunt and leave the stumpage with Oldfield. It was testified that the stumpage was paid and the logs scaled by Hunt. There was evidence before the jury that every thing had been done that the bargain called for.

The plaintiffs obtained a charge that "if the value of the property exceeds fifty dollars, no sale would be valid from Stilson to Erskine unless part of the property was received by Erskine or part of the price paid to Stilson." There was no evidence of any other sale than that testified to by Oren Erskine. In a subsequent part of the charge the court informed the jury that if it was a license, it would be good, but if a sale, it would be bad unless on the conditions named, which were not in proof, and were not possible in such a case.

The transaction was one which could only be in law regarded as a license. It is the very instance frequently given in the definitions to explain that word as creating an estoppel against complaining of acts done under it before revocation, or from preventing the enjoyment of the results of what was thus done. In *Thomas v. Sorell, Vaughan 35*, it was held by Vaughan, C. J., that a license, coupled with the grant of an interest, was irrevocable, so far as it was essentially necessary to the enjoyment of the grant. In illustration of this principle he put the case of a permission to cut down a tree on the land of another, and to

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come on the land at any subsequent period for the purpose of removing it. This was said to be a mere license as to the right of entry, but to amount to the grant of an absolute interest in the tree as soon as the permission to cut it down was executed. The cases are brought together and discussed in *2 Am. Lead. Cases, 688, et seq.* And it seems to be well settled that such a permission, while it operates as a sale or grant of that which, by the execution of the license, is to be transformed into a chattel, is nevertheless entirely outside of the statute of frauds, not being more than a license until executed. It is not a sale of an interest in lands, and it is not a sale of an existing chattel, but of a future one.

The instruction given was not based on any thing in the case which could call for it as applicable to a sale of chattels under the statute of frauds, and it could only be understood as applying to the transaction sworn to by defendants' witnesses, and had an inevitable tendency to mislead the jury in that regard. The whole defense turned upon this question, and the effect of the charge was to throw a doubt over its validity, whatever might have been their view of the relative merits of the opposing witnesses. The question of earnest money or partial delivery could not apply to such a transaction.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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Samuel C. Wood v. James J. Parsons.

Comity: Foreign laws: Proceedings of foreign courts: Title. Proceedings by a Canadian court under the Canadian Insolvent act, had against a person while he was in this state, cannot, by mere force or operation of the orders and decrees therein made, and in the absence of any transfer by the insolvent himself, vest the Canadian assignee with title to promissory notes in this state which have never been within the territorial jurisdiction of the Canadian court or subject by any process to its control; and the fact that the insolvent afterwards went to Canada and submitted himself to the jurisdiction of that court, would not help the matter.

Heard April 17. Decided April 28.

Error to St. Clair Circuit.

A. E. Chadwick, for plaintiff in error.

Trowbridge & Atkinson, for defendant in error.

CHRISTIANCY, CH. J.

The plaintiff in error brought an action of replevin in the circuit court for the county of St. Clair, against the defendant in error, for a promissory note, or due bill, made by Cyrus Miles, payable to John Atkinson or bearer, for one thousand four hundred and thirty-eight dollars, dated February 22d, 1871.

The plaintiff introduced evidence tending to show that John Atkinson, in February, 1871, as the agent and attorney of one Gomer Potter Edwards, received in this state from said Edwards certain promissory notes executed in Canada and by parties residing in Canada, all of which, except one, to some other party than Edwards, and none of which (except possibly one) was then due; that all were payable to bearer; that Edwards instructed him to sell the notes for cash or for a good note of some party in Michigan; that the notes amounted to one thousand four hundred and eighty-eight dollars besides interest, and were payable in Canada currency; that he sold said notes to said Cyrus

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Miles for the note or due bill of said Miles, to obtain which this action was brought; that Atkinson sent this note to the defendant, directing him to send Edwards a receipt for it; that this note was taken for Edward's, and it was held by the defendant as above stated; that Atkinson, as attorney for Miles, sued some of the notes (Miles had thus taken) in Canada, and Miles collected some of them; that Wood, the plaintiff in this suit, procured an injunction in Canada to restrain the payment to Miles by the makers of these notes, but upon subsequent negotiation between Atkinson (on the part of Miles) and Wood, it was agreed that Wood should discontinue his chancery proceedings against Miles, and permit Miles to collect the notes, which he did, and that Wood should bring a suit in St. Clair county, Michigan (where Miles resided), for the note given by Miles.

The plaintiff introduced one William Grace as a witness, whose evidence tended to show that he was the clerk of the county court of the county of Victoria, province of Ontario, dominion of Canada; that he was familiar with the statutes of Canada, and that a copy entitled "Laws of Canada, 38 and 39, Vict." (so stated in the record, probably 28 and 29 Vict.), being the authorized and public law, was given as the authentic laws and printed under the authority of the dominion parliament; and the act contained in said statutes entitled "Insolvent Act," was the insolvent act of the dominion of Canada. But neither this act nor any other law of Canada is set out or made part of the bill of exceptions.

This witness also produced the original record of the county court of the county of Victoria, and gave evidence tending to prove that they were the original and all of the records of a proceeding in said court, in a case entitled "Insolvent Act of 1869,—In the matter of Gomer Potter Edwards, an insolvent;" that he was the clerk of said court, and as such had the custody of said records.

Under this proof and a stipulation that this record should be received as the records of such court (being a court of

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record), as though attested under the certificate and seal of the court, and otherwise duly authenticated, the plaintiff's counsel offered said law and record in evidence, and the same was received; said record tending to show the filing of affidavits of several of the creditors of said Edwards, showing him to be an absconding and insolvent debtor; that his residence and place of business was, and had been, in said county of Victoria; which affidavits were filed on the 22d of April, 1870; an order of the same date, signed by the judge of said court, declaring said Edwards an insolvent, within the meaning of said act; that attachment against the estate, property, goods and chattels of said Edwards, issue from said court to the sheriff of said county of Victoria, to seize, attach and take the property of said insolvent; that valid service may be made by serving the wife of the insolvent in Victoria county personally with the writ and a copy of this order, and that it may be further validly served by mailing a copy of the writ and order to the address of said Gomer Potter Edwards, Detroit; a return of the writ with proof of service according to the mode prescribed in this order; an order for the examination of Robert Thomas Edwards; the examination of Gomer Potter Edwards in a chancery proceeding against Miles *et al.*; the petition of Gomer Potter Edwards, May, 1871, asking for his discharge; also minutes of meetings of creditors on several occasions; the nomination of Samuel C. Wood as assignee, and the confirmation of the same by the court; the proof and allowance of claims, and the pending of the proceedings at the commencement of this suit, and also the insolvent act in question (which, however, as already noticed, is not made part of the case in this court).

I have thus set forth from the bill of exceptions all that the evidence tended to show, and for any awkwardness in the statement, the bill of exceptions is responsible.

All the above evidence was admitted against the objection of the defendant.

It is unnecessary to notice the several requests to charge,

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or the various questions raised upon them, as the court took the evidence from the jury, and instructed them that the defendant was entitled to their verdict. If, therefore, there was any evidence in the case tending to show a state of facts which would have authorized the jury to find a verdict for the plaintiff, the court erred, and the judgment should be reversed; but if there was no evidence from which they could properly so have found, the court was right in taking the case from the jury, and the judgment must be affirmed.

It sufficiently appears from the record of the proceedings in insolvency, that the insolvent was, on the 22d of April, 1870, in Detroit, in this state, and not in Canada, when the order was made for serving upon his wife, and sending copies by mail to him at Detroit; and there is no evidence in the case tending to show that he was in Canada, or that he submitted to the jurisdiction of that court until May, 1871.

It appears that in February, 1871, he had the notes with him in this state, by the sale of which the Miles note was obtained, and that this sale was made in February, 1871. There is no evidence tending to show at what time he obtained them, or that they were within the Canadian jurisdiction at the time of the insolvency proceedings, or while they were pending; and it is clear enough the notes were not found there and taken upon the attachment issued in those proceedings; and there is no evidence tending to show that the insolvent, either voluntarily or by the direction of the court, ever made an assignment of these notes or of the Miles note or any of his property, to Wood, the plaintiff, who was by the court appointed his assignee. As we have not before us, as a part of the case, the Canadian statute referred to, and cannot take judicial notice of it, we cannot determine what would have been the effect of those proproceedings upon the property of the insolvent in Canada, or upon the insolvent himself, when within that jurisdiction.

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But, whatever may have been the effect of that statute and those proceedings in Canada, it is at least clear that the Canadian court could not, by the mere force or operation of its orders or decrees, affect the property in question in this state, unless that property had been or should be within the territorial jurisdiction of the dominion of Canada, and while there, subjected to the control of that court, by seizure or some process or proceeding which would have enabled that court to enforce a sale of the property, and make that sale effectual by delivery.

Nor can it alter the case that the insolvent himself returned to Canada and submitted to the jurisdiction of that court after the purchase of the Miles note in question and before the institution of this suit; so long as it does not appear that this note was brought within that jurisdiction, or that he had assigned or conveyed it to the assignee. The judgment or decree of that court could not affect his property in this state nor his right here to dispose of it.

These conclusions seem to result from the universally admitted principle that the laws enacted by one sovereignty can have no force or effect, as laws, within the territories of another sovereignty, and that the courts of one sovereignty cannot subject persons or property in another to the direct effect of its judgments, orders or decrees.

Had the insolvent in this case, with or without the intervention or order of the court, made an assignment of this property to Wood, the plaintiff, we see no reason to doubt that such assignment would have operated as a conveyance of the title to any property of the insolvent here, except possibly in some cases, as against the claims of creditors here.—See *Graydon v. Church, 7 Mich., 36.*

We see no mode in which a different result can be reached in the present case, without giving to the orders and decrees of the Canadian court the same direct force and effect in this state as we give to those of our own state courts.

Certainly neither the English nor the American courts

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have yet recognized the comity of states or nations to this extent, nor is it so far recognized between the several states of the American union; and in reaching this conclusion we have applied no less liberal rule than that which is recognized between these states.—See *Graydon v. Church, ubi supra.*

The result is that there was no evidence tending to establish the title of the plaintiff to the property replevied, and the court properly took the case from the jury.

The judgment of the circuit court must be affirmed, with costs.

The other Justices concurred.

The People on the relation of Louis F. Long v. The Judge of the Wayne Circuit Court.

Declaration: Amendment: Statute of limitations. It is competent for the court to allow a declaration for false imprisonment to be amended by adding a new count for malicious prosecution arising out of the same transaction, at any time before the new cause of action has become barred by the statute of limitations.

Heard and decided April 22.

Application for *mandamus.*

Anson Dolph commenced suit by *capias* in the Wayne circuit against the relator on January 30, 1872. Declaration for false imprisonment was filed, to which the relator pleaded the general issue. The plaintiff, on motion, obtained leave, March 28, 1873, to amend his declaration by adding a count for malicious prosecution, and afterwards, April 8, 1873, amended accordingly.

The relator now applies for *mandamus* to compel the respondent to vacate the order granting leave to file such

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amended declaration and to strike the amended declaration from the files.

Ward & Palmer, for the relator.

S. Larned and *H. M. Cheever*, for the respondent.

THE COURT held that the new count added by the amended declaration being for the same cause of action as that set up in the original declaration, and the right of action not being barred by the statute of limitations at the time the amendment was made, it was competent for the respondent to grant the order in question.

Mandamus denied, with costs.

The Board of Supervisors of Midland County v. The Auditor General.

Auditor general: Taxes: Settlement with county: Certiorari. The action of the auditor general in charging back to a county certain taxes in his settlement with the county, being the exercise of an official discretion belonging to an executive department of the state government, is not subject to judicial review, and cannot, therefore, be examined upon *certiorari*.

Heard and decided April 22.

Application for *certiorari*.

Application is made for a writ of *certiorari* to bring up for review the action of respondent in charging back to Midland county certain taxes assessed upon lands included in the land grant to the Flint & Pere Marquette railroad company.

George V. N. Lothrop presented the application.

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THE COURT held that the action of the respondent in the premises, being the exercise of an official discretion belonging to an executive department of the state government, is not subject to review judicially, and cannot, therefore, be examined upon *certiorari* from this court.

Writ denied.

The People on the relation of Thomas Griffin v. Henry Z. Potter.

Justice of the peace: Payment into court: Garnishment: Judgment. A justice of the peace before whom a judgment has been obtained and to whom the same has been paid pending garnishee proceedings before him to reach the avails thereof, may, upon judgment being rendered, in such garnishee proceedings, against the judgment debtor and after the time for appealing therefrom has expired, apply the money so paid into court in payment of such garnishee judgment.

Heard and decided April 22.

Application for *mandamus*.

The relator obtained judgment before the respondent, a justice of the peace for the city of Detroit, against one Ellen O'Connor, upon which execution issued and was placed in the hands of a constable. Subsequently one Jeremiah O'Connor brought suit before the respondent against the relator, and garnished said Ellen O'Connor. To the writ of garnishment Ellen O'Connor answered admitting the indebtedness to the relator by virtue of his judgment against her.

Jeremiah O'Connor having recovered judgment against the relator as principal defendant, the respondent rendered judgment against Ellen O'Connor as garnishee defendant, upon her answer. Thereupon she paid the money into court to satisfy the relator's judgment against her, and the

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respondent recalled the execution (under which nothing had been done), and entered satisfaction of said judgment. After the expiration of the time limited for appealing from the judgment in the garnishee proceedings, no appeal having been taken, the respondent applied the money so received, in payment of the judgment in favor of Jeremiah O'Connor, and refused, on demand by the relator, to pay the same over to him.

The relator now applies for *mandamus* to compel the respondent to issue execution upon said judgment or to pay the money over to him.

George H. Penniman, for the relator.

Moore & Griffin, for the respondent.

THE COURT held that the action of the respondent in the premises was correct, and denied the writ.

Schuyler H. Platt v. Urs Haner.

Patent: Parol evidence. Parol evidence of the contents of a United States patent is not admissible.

Heard and decided April 23.

Error to St. Clair Circuit.

This was an action of trespass *quare clausum*, brought by Haner against Platt before a justice of the peace and certified to the circuit upon notice that the title to land would come in question. On the trial the question appeared to be one of disputed boundaries, and parol evidence was admitted against objection, of the description of premises contained

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in the United States patent of the lands in question. The plaintiff recovered judgment below, and the defendant brought error.

V. A. Saph and *Trowbridge & Atkinson*, for plaintiff in error, were stopped by the court.

T. C. Owen, for defendant in error.

THE COURT held that parol evidence of the contents of a United States patent is inadmissible; for, if the patent itself is lost or not accessible, the proof by exemplification from the general land office is equivalent in degree and should be obtained.

Judgment reversed, with costs, and a new trial awarded.

Henry Howard and others v. Henry R. Tomlinson and another.

Judgment entry: Assessment of damages: Recital. A judgment entry on default (with a proper reference to the court to assess the damages), which first recites the default and then proceeds, "and the damages of the said plaintiffs having been assessed at the sum of," etc., and thereupon awards judgment in the usual form, is not open to objection upon the ground that it does not show that the damages were assessed by the court.

Circuit court rules: Time for making defaults absolute. It is competent for the circuit court to make a special rule shortening the time limited for making defaults absolute to two days in term.

Heard and decided April 23.

Error to Lapeer Circuit.

Tomlinson & Waterbury sued Howard, Pardo & Halstead in assumpsit on the common counts. Personal service was had on all the defendants, and they made default. The first default was entered August 27th, 1872, and the default abso-

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late, August 30th, 1872. The reference to assess damages was to the court. The judgment entry was as follows:

"In this cause the default of the said defendants for want of a plea having been duly entered, and the damages of the said plaintiffs having been assessed at the sum of two thousand one hundred and ninety-four dollars and ninety-two cents, over and above the costs and charges by them about their suit in this behalf expended: Therefore, on motion of W. W. Stickney, attorney for the said plaintiffs, it is ordered and adjudged by the court now here that the said plaintiffs do recover against the said defendants their damages aforesaid, together with their costs and charges aforesaid, to be taxed, and that the said plaintiffs have execution therefor."

The defendants bring error and seek to reverse the judgment because the judgment entry does not show that the damages were assessed by the court; and because the default was made absolute three days after the entry of such default. On the hearing in this court counsel for defendants in error produced a certified copy of a special rule of the Lapeer circuit shortening time for making defaults absolute to two days in term.

R. V. Briggs and *Henry M. Cheever*, for plaintiffs in error.

W. W. Stickney and *Wilkinson & Post*, for defendants in error, were stopped by the court.

THE COURT held that the objections were neither of them well taken. In the absence of any thing to the contrary, it is to be presumed that the assessment recited was made by the court, and is properly made. Rule 23, providing for making defaults absolute in four days, is subject to the further condition "or in such other time as may be ordered by the court." And rule 72 gives general power to the circuit courts to shorten or extend such time.

Judgment affirmed, with costs.

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The People on the relation of William H. Stebbins v. The Judge of the Barry Circuit Court.

Equity pleading and practice: Hearing: Mandamus. A circuit court cannot decline to hear a cause in chancery, where either party has regularly claimed a hearing in open court, unless an order has been made upon good cause shown, directing it to be proceeded in otherwise. Such a case may be placed on the docket, and a *mandamus* lies to compel the court to proceed in it as right and justice may require.

Heard April 22. Decided April 24.

Application for *mandamus*.

George C. Worth and *C. I. Walker*, for the relator.

I. A. Holbrook and *W. E. Cheever*, for the respondent.

CAMPBELL, J.

The *mandamus* in this case is asked for on the ground that the circuit judge declined to hear a cause that had been noticed for hearing in open court, and it is opposed on the ground that he has a discretion to make such refusal.

We think the statute does authorize the circuit court to make provision for hearing cases otherwise than on testimony in open court. But this can only be by a special order, upon good cause shown. In the present case no such proceeding appears to have been had, and until it has been done, the statutory right remains unimpaired, and a refusal to hear the cause would not be justified.

The relator has a right to notice his cause for hearing, and to have it placed upon the docket. A *mandamus* should be allowed directing the circuit court to proceed in the cause, when so noticed, as right and justice may require.

GRAVES AND COOLEY, JJ., concurred.

CHRISTIANCY, CH. J.: I concur in the result.

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Charles Peters v. James Goulden.

Prohibitory liquor law: Amendments: Vested rights. One who had paid moneys for liquors sold to him in violation of the prohibitory liquor law, as it existed before the amendment of 1871, had a right to recover it back as money paid without consideration, and this right of action was a vested one which subsequent changes in the statute could not affect.

Prohibitory liquor law: Moneys paid for liquors: Right of recovery. The right of recovery under this statute is not limited to the sum paid at any one time.

Heard April 23. Decided April 24.

Error to Sanilac Circuit.

Watson Beach and *O'Brien J. Atkinson*, for plaintiff in error.

B. C. Farrand and *William T. Mitchell*, for defendant in error.

COOLEY, J.

This was a suit brought to recover back moneys paid as the purchase price of liquors sold in violation of the prohibitory liquor law. The circuit judge instructed the jury that the plaintiff could not recover.

The argument in this court in support of the judge's instruction is, that the section of the statute which gives this right of action was re-enacted with alterations in 1871, after the sales in question were made, and this re-enactment, it is insisted, is to be regarded as a new law which repealed the old, and consequently no recovery could be had except under the new law, and that could apply only to sales since made.

We have no occasion to examine this argument. The prohibitory liquor law, as it was when the sales were made, declared all moneys paid for liquors sold in violation of its provisions, to be paid without consideration, and recoverable by the party paying on that ground. This being so,

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the plaintiff had a vested right of action for the money, which would not be affected by subsequent changes in the statute.

The circuit judge also expressed an opinion to the jury that if plaintiff could recover at all, he could recover only the sum paid at some one time. This opinion was also erroneous. Under the common counts in his declaration he could recover any number of payments, as he might in other cases to which those counts were applicable.

Judgment reversed, with costs, and a new trial ordered.

The other Justices concurred.

Perry Hannah and another v. William H. Fife and another.

Contracts: Public policy. An agreement whereby A is to enter into and perform a contract with the state for the construction of a swamp-land state road, and to give B, who, at the public letting of the work, under the statute, had been the lowest bidder, as a bonus for being allowed to take his place in the contract, a portion of the swamp lands to be secured from the state for the performance of the work, is void as being against public policy.

Letting contracts for public work: Collusion: Competition: Combinations. Secret collusive agreements and combinations between proposed bidders to prevent competition at the letting of contracts for public work considered, and the principles upon which they are held void discussed.

Statutes construed: Contracts: Public policy. The statutes (*Sess. L. 1859, p. 315, § 7; Sess. L. 1863, p. 380*), providing that contracts to construct swamp-land state roads shall "in all cases be let to the lowest responsible bidder," do not admit of the substitution of another person as contractor in place of such bidder; and any contract based upon such illegal substitution is void.

Agreement to use influence to get illegal contract with state confirmed. Whether a stipulation in an agreement to use one's efforts and influence to get a contract with the state confirmed and to use no influence or effort to defeat it would, of itself, render the agreement in which it occurs void:—*Quære?*

Such a stipulation, however, relating to the consummation and approval of an illegal contract, cannot be considered unobjectionable in deciding upon the validity of the agreement containing it.

Heard April 16. Decided April 29.

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HANNAH v. FIFE.

Error to Grand Traverse Circuit.

Fitch R. Williams and *G. V. N. Lothrop*, for plaintiffs in error.

E. S. Pratt and *Ramsdell & Benedict*, for defendants in error.

CHRISTIANCY, CH. J.

This was an action of assumpsit brought by Fife and Haviland in the circuit court for the county of Grand Traverse against the plaintiffs in error, as the sureties of one Oscar L. Noble, in a contract between said Noble and Fife and Haviland, by which Noble agreed to enter into and perform a contract with the state for the construction of a swamp-land state road, for the building of which said Fife and Haviland had been the lowest bidders, and to give them as a bonus for being allowed to take their place in the contract, eight sections of the swamp lands to be received from the state for the performance of the work.

A copy of the contract is given below.

The evidence in the case tends to show the following state of facts:

Dewitt C. Leach, in April, 1868, being the local commissioner of the road in question, whose business it was, on behalf of the state, to let the contract for the building of the road to the lowest responsible bidder, subject to the approval of the general swamp-land state road commissioners, and having given due notice of the time and place of letting the contract, proceeded, in accordance with said notice, on the 9th day of April, 1868, to open the bids which had been received, two bids only having been put in for the whole work advertised to be let, one of which was by said Oscar L. Noble and the other by Fife and Haviland. And upon opening the bids in the presence of all these parties, it was found that Noble's bid was for a road-bed to be graded only sixteen feet wide, which was not in accord-

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ance with the plan adopted by the state authorities or with the notice, which required such road-bed to be twenty feet wide; but he proposed to complete the work by the first day of December then next, while the bid of Fife and Haviland was for a road-bed twenty feet wide, according to the plan and notice, but proposed the completion of the work only by the 7th day of April, 1869. Each of the bids was for two sections of land to the mile, which was the maximum quantity allowed by law for the work.—*Laws of 1863, pp. 322–323; Laws of 1867, Vol. 2, p. 854.* The commissioner, therefore, on reading the bids aloud in the hearing of the parties, said to them that it was manifest from the reading of the bids, to whom the job must go, meaning to Fife and Haviland, and all the parties so understanding him. And the commissioner was about to award the contract to them, and would have done so at once; but Noble, in that stage of the transaction, requested the commissioner not to take any further steps in the matter until he and Fife and Haviland should have an opportunity to consult together; and thereupon Noble and Fife and Haviland left the room, and returning in a few minutes, all joined in a request that matters should remain as they were until they could have more time to consult. The matter then remained open until the 11th day of April; and during this time there was considerable consultation between the parties, and they separately conferred with the commissioner. The result was that Noble and Fife and Haviland, having entered into the agreement upon which this suit is brought, on the 11th of April the contract with the state for building the road was, by the commissioner, with the assent and approval of Fife and Haviland, made directly with Noble, instead of Fife and Haviland, to whom it would otherwise have been awarded. But the commissioner made this contract with Noble substantially upon the terms of the bid of Fife and Haviland, though upon somewhat more favorable terms to the state, as it provided for the completion of the work by December 1st, 1868, instead of April 7th, 1869,

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which that bid proposed. The contract with Noble being executed by the local commissioner was delivered to Noble with the bids, to be taken to Lansing, but the local commissioner made no report to the state commissioner, of the facts in the case or the substitution of Noble in place of Fife and Haviland, nor does it appear that he was ever notified of it. The contract of Noble was approved by the state commissioner; and the better to appreciate the nature of the contract of Noble with Fife and Haviland, upon which this suit is brought, it is proper to say that the substance of Noble's contract with the state was for the building of this road (59 miles and 25 chains) in the particular manner therein specified, to be completed by the first day of December, 1868; upon the completion and acceptance of which, and a certificate by the proper authorities, Noble was to receive in full compensation for the work, a grant by patent from the state, of one thousand two hundred and eighty acres (two sections) of swamp lands per mile; one-half to be taken from the counties in which the road ran, in proportion to its length in each county, and the other half from any unsold state swamp lands in the lower peninsula applicable to the construction of this road at the time of selection. And this contract was expressly made subject to the approval of the swamp-land state road commissioner.

Such was the substance of Noble's contract with the state, and such the circumstances under which that contract was made, as well as the contract of Noble with the plaintiffs below, in which the defendants below were Noble's sureties. This contract is in the following words: "An agreement made this 11th day of April, A. D. 1868, by and between W. H. Fife and Joseph B. Haviland, of Grand Traverse county, state of Michigan, parties of the first part, and Oscar L. Noble, of Antrim county, state aforesaid, of the second part, and Perry Hannah and Henry H. Noble as sureties for the performance of this contract on the part of Oscar L. Noble, party of the second part, to wit:

"W. H. Fife and Joseph B. Haviland this day agree to

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allow D. C. Leach, local commissioner on the north division of the Midland City and Traverse Bay state swamp-land road, to make out and execute a contract with Oscar L. Noble, for the building of the north division of the Midland City and Traverse Bay state road, which was awarded to said Fife and Haviland at the declaring of said bid by the said local commissioner, on the 9th day of April, A. D. 1868. In consideration of the said Fife and Haviland agreeing to the above, the said Oscar L. Noble agrees on his part to execute a contract according to the printed forms of the state road commissioner, with the local commissioner, for the building of the north division of the Midland City and Grand Traverse Bay state swamp-land road, to be completed by the 1st day of December next, for the same pay in state swamp lands from the state of Michigan that is contained in the bid of Fife and Haviland.

"And the said Oscar L. Noble further agrees, if the contract which he makes with the local commissioner is approved by the state swamp-land road commissioner, that he will give to the said Fife and Haviland four sections of state swamp land, to be selected by the said Fife and Haviland, in any of the counties through which the road may run, and four sections of land to be selected from any of the unsold state swamp lands in the state of Michigan; and that he will receive from the said Fife and Haviland any description of unselected or unsold swamp lands, belonging to the state of Michigan, and hold the same on his contract for them until he can obtain a title to the said lands in their names by the completion of the work on his contract, which shall all be done on or before the first day of December next, except that he will mature to the said Fife and Haviland a title to one section which they may select out of the first matured scrip he may have a right to, from the state of Michigan. It is also understood and agreed, that if the said parties should conflict in making selections of swamp land, that the parties of the first part, Fife and Haviland, shall have the preference in choice, which shall

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be within ninety days from this date. The said Oscar L. Noble further agrees to use all due diligence on his part, to get said contract consummated, and that he will not influence, counsel or advise, nor become a party interested with any one else in making a contract to defeat the approval of this contract, which he agrees to make with the state of Michigan, and in case he should do so, then he shall be liable to the said Fife and Haviland for the value of said land.

"The parties do hereby mutually agree that if the state swamp-land road commissioner shall disapprove of the contract made between the local commissioner and Oscar L. Noble, according to the stipulations herein named, then the said Oscar L. Noble shall not be holden to the said Fife and Haviland in this agreement."

Now, while it is not claimed on the part of the plaintiffs in error that there was any fraud on the part of the commissioner in letting the contract to Noble instead of Fife and Haviland, the lowest responsible bidders, and it is admitted that he made it with Noble upon even better terms for the state than if let to the bidders themselves upon the terms of their bid, yet it is insisted that the contract between Noble (with his sureties) and Fife and Haviland, made under such circumstances, was illegal and void, as against public policy, and that it cannot be held valid without giving encouragement to, and furnishing facilities for, corrupt and collusive combinations among bidders for such contracts, and thereby defeating the object of the legislature in requiring such contracts to be let to the lowest responsible bidder.

The introduction of the contract in evidence was objected to on this ground, and the same question is fairly raised by several of the requests to charge, which were refused by the court.

The only statutes under which the commissioner was authorized to act in letting the contract on the part of the state, for the building of this and other like roads, required

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that the contract, in persuance of previous public notice to that effect, should, "*in all cases*, be let *to the lowest responsible bidder.*"—*Act of Feb. 12, 1859, Laws of 1859, p. 316, § 7; Act of March 20, 1863, Laws of 1863, p. 380.*

The object of the legislature in requiring such contracts to be let to the lowest responsible bidder, cannot be mistaken. It was to prevent fraud, and, so far as possible, the temptation to fraud and collusion between the officers letting the contract and the persons taking it, to excite competition among parties seeking to undertake work of this kind, and by these means to secure the doing of the work for the lowest price and on the most advantageous terms for the state.

Now, if these bidders, Noble on one side, and Fife and Haviland on the other, had, before or at the time of making their respective bids, entered into a secret agreement for their mutual profit and to avoid competition with each other, that for the purpose of getting a contract from the state for building this road at the highest rate or greatest quantity of land allowed by the law, only one of the parties should put in a bid which, in its terms, would accord with the plan of the road adopted by the state and with the notice given; while the other, though not in accordance with that plan or notice, should in all other respects appear to be in accordance with the terms proposed by the state, and better in some respects than the bid of the other, but which, nevertheless, could not be accepted, because not in accordance with the plan; thus securing in advance the letting of the contract to one of the parties (unless others should offer better terms), without danger of competition from the other, while keeping up the appearance of competition; and that the contract should be performed by one of the parties for the mutual profit of both; or that the party taking the contract and doing the work should give to the other as his share of profit eight sections or any other portion of the land to be received from the state, if such had been the previous arrangement between the parties, it

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will not be pretended that such an understanding, or any agreement resting upon it, or calculated to carry it into effect, could have been sustained. It would have been so manifestly fraudulent as against the state, and so subversive of the intentions and objects of the legislation, that no court could hesitate for a moment to declare it illegal and void.

Now, there is no evidence in the present case, except such inferences as may be drawn from the circumstances and the contracts made, that such was the previous agreement between these parties. But had there been such previous arrangement or any arrangement by which they were to avoid bidding against each other, and yet both divide the profits of the job, it must be admitted that this mode of bidding, the subsequent conduct of the parties leading to the contract between them, and that contract itself, were all admirably adapted for carrying such previous arrangement into effect. And it is difficult to resist the conclusion that these things tend pretty strongly to show the existence of some such previous understanding. It is perfectly clear, at least, that Noble, though ostensibly a competing bidder, was willing to take the contract upon Fife and Haviland's bid, and to do the whole work sooner than their bid required, and yet pay them a bonus of eight sections of land (5,120 acres). And we may safely assume that, after allowing them this bonus, he was satisfied the contract would still be profitable to himself, or he would not have taken it and agreed to pay that bonus. It cannot be doubted that he would just as readily have bid, and taken the contract from the state, at eight sections of land less than the bid, if he had not had to give these eight sections of land to Fife and Haviland.

But if he, without concert with the other bidders, had made his bid for so much less land, and made it according to the specifications in the notice, so that it might have been accepted, though he would have stood a chance to get the contract, he would also have run the risk of losing it by their bidding for a still less quantity. Had the bids of

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both parties been in accordance with the notice and equally favorable to the state in other respects, yet both being for an equal quantity of land, neither would have been the lowest; and each being ready to give good security, the bids would have been equal, and a further bidding would have been necessary, which must have reduced the price and resulted in a benefit to the state. The putting in a bid, then, by Noble in a mode which under the notice could not have been accepted is not, when considered with reference to the subsequent acts of the parties, easily explained upon any other rational theory than that of previous concert for the purpose already intimated.

But, whether there was, in fact, any such secret understanding or fraudulent collusion between the bidders or not, is, in my opinion, entirely immaterial to the decision in the present case.

It seems to me clear that the tendency of all such contracts between bidders as that here in question, if recognized as valid by the courts, must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder; that such must be the natural tendency of allowing the commissioner to recognize any bargain or agreement between the bidders after the bids were opened, transferring to another the right of the lowest bidder to the contract bid for, and the substitution of the one for the other, as contractor with the state. It is this tendency, rather than the fact of actual fraud in the particular transaction, which is generally recognized as rendering contracts void, as against public policy.— *Mills v. Mills, 40 N. Y., 543; Tool Company v. Norris, 2 Wallace, 45; People v. Township of Overyssel, 11 Mich., 222; O'Hara v. Carpenter, 23 Mich., 410.* And we think the contract sued upon must be held void upon this ground.

And, besides this general view, we think the contract

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must be held void upon another analagous, but somewhat narrower ground. The mischievous tendency of the contract is sufficiently strong and manifest to warrant us in holding that the power of the commissioner to let these swamp-land road contracts must not be recognized as extending beyond the plain provision of the statutes, which require that "such contracts shall *in all cases be let to the lowest responsible bidder;*" and that, if this language could otherwise possibly admit of a construction which would allow the substitution of another person as the contractor, we cannot so extend it, when the manifest tendency would be to defeat the object of the statute itself, by encouraging the very evils it was intended to prevent.

The refusal of the commissioner to allow any such substitution might not, it is true, always prevent frauds upon the state by secret combinations among bidders, but it would lessen the means and cut off some of the facilities by which such fraudulent combinations might be carried into effect. And though we do not question the good faith of the commissioner, we think he mistook his duty and exceeded his powers; and that his only safe and only legal course was to follow the statute, to stand by the bid, and let the contract to the parties making it, or refuse to let it at all.

The thirst for public plunder, always strong, has of late been stimulated to unwonted eagerness, and seized like an epidemic upon all classes of the community. If public officers and the courts cannot check its progress by any obstacles of their own creation, they can, at least, refuse to aid in spreading the contagion, and may do something to discourage and check its course, by refusing to afford it such facilities as it may be within their power to withhold.

As the commissioner had no power to allow the substitution, and the contract sued upon is based upon that illegal substitution, to which the plaintiffs were parties, it must be held void upon this ground.

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Whether the stipulation in the contract sued upon requiring Noble, in effect, to use his efforts and influence to get the contract with the state confirmed by the commissioner and to use no influence or effort to defeat it, would of itself render the contract in which it occurs void, if the contract to which it refers had been legal and valid, we need not decide. But this stipulation, relating to the consummation and approval of an illegal contract, can hardly be considered unobjectionable in deciding upon the validity of the contract in which it occurs.—See *Fuller v. Dame, 18 Pick., 479; Hutchen v. Gibson, 1 Bush (Ky.), 270; Mills v. Mills, 40 N. Y., 543; Cook v. Shipman, 51 Ill., 316; Hatzfield v. Gulden, 7 Watts, 152; Tool Co. v. Norris, 2 Wallace, 45; Eddy v. Capron, 4 R. I., 395.*

The contract upon which the suit was brought being, in our opinion, void, the judgment of the circuit court must be reversed, with costs. The errors being all assigned upon the bill of exceptions, we must *pro forma* award a new trial, though we are unable to discover how it can be rendered of any avail to the plaintiffs below.

CAMPBELL and COOLEY, JJ., concurred.

GRAVES, J., did not sit in this case.

John L. Thompson v. Henry Moesta.

Trover: Bailment: Reasonable care: Conversion: Charge to the jury. In an action of trover for the conversion of certain machinery and tools which the defendant leased of the plaintiff and failed to restore at the end of his term, a charge to the jury that a failure on the part of the defendant to keep and care for the goods as a prudent man would of his own, would put an end to the relation of bailor and bailee and render him guilty of the conversion and entitle the plaintiff to bring trover without any demand, is too broad where the evidence of want of due care points only to a portion of the property, and as to that, only shows an exposure to possible injury which does not appear to have resulted in fact.

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THOMPSON v. MOESTA.

Trover: Evidence: Assent: Conversion: Demand. In such a case proof that a mortgagee of the property told the plaintiff none of it must be removed until the mortgage was paid or reduced and the plaintiff replied "all right," and that the mortgagee communicated this to the defendant and urged him not to let the property go till the mortgage was reduced, is evidence from which assent of the plaintiff to the retention of the property might have been found; and if he gave such assent he could not hold defendant liable in trover afterwards without first withdrawing the assent and demanding the property.

Trover: Offer to deliver: Presumption: Conversion. In the absence of evidence of any demand and distinct refusal to deliver up the property, in such case, notice to the plaintiff that he must remove the property or defendant would charge him rent, is equivalent to an offer to deliver, and rebuts the presumption of conversion; and the fact that such offer was made, not to plaintiff directly, but to another who communicated it to plaintiff, does not lessen its effect.—CAMPBELL, J., dissenting.

Heard April 18. Decided April 29.

Error to Wayne Circuit.

S. Larned and *Minock & Baker*, for plaintiff in error.

O. Kirchner, for defendant in error.

COOLEY, J.

Thompson leased certain premises of Moesta, and also certain machinery and tools in use in a shop thereon. The machinery and tools appear to have been previously mortgaged by Moesta to one Hasselbacher, and though it is not distinctly stated in the record that the mortgage was over due at the time this controversy arose, that fact is to be inferred. There was evidence in the case that Hasselbacher told Moesta that he must not remove any of the property mortgaged until the mortgage was paid or reduced; that Moesta replied, "All right," and Hasselbacher communicated this to Thompson, and told him not to let the property go until the mortgage was reduced; that Hasselbacher afterwards consented to an engine and boiler being taken out and sold, which was done, and then Hasselbacher told Thompson to let the balance of the things go on demand, and Thompson, who had then become tenant of the shop to another person, told Hasselbacher,—who communicated the same to Moesta,—that he wanted to repair his shop, and if the things were not taken away he should charge rent for

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them. Moesta did not come for them, but sued Thompson in trover for the value, and in the court below recovered judgment.

It is sought to sustain this judgment on two grounds: *First:* That Thompson, while the property was in his possession, suffered it to be so abused and injured as to render himself liable as for a conversion. The evidence on that point is, that when Moesta took away the engine and boiler, he took down for the purpose of taking away, some gearing and shafting, but for some reason left it lying upon the shop floor; that Thompson, finding it in his way, put it into the yard, where it lay for about two days, as Moesta says, in the rain and mud. Moesta says further that this usage would injure such articles, but Thompson testified that they were not in fact injured at all, and neither Moesta nor any other person undertook to deny this statement. There was no evidence to show injury to other articles, and no claim to that effect.

The circuit judge charged the jury that if Thompson failed to keep and care for the goods as a prudent man would of his own, the relation of bailor and bailee was at an end, and the defendant was at the time guilty of the conversion of the property, and the plaintiff could recover in this action without proving any demand. This instruction would seem to refer to all the property, and must have been understood by the jury as authorizing and requiring them to find for the plaintiff for the value of all the articles if they found a failure to observe due care and diligence in the keeping of any of them. There was nothing in the case to warrant so broad a charge. Even as to the gearing and shafting, it is exceedingly difficult to say that under the circumstances there was any such abuse shown as should have been referred to the jury on the question of conversion, for Moesta had actually taken it into his own possession, and if instead of removing it, he left it in Thompson's way, it is very manifest that the latter, even if not justifiable in what he did, could not justly be held liable to

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pay the value of the property because in putting it out of the way he exposed it to a possible injury which nobody ventures to say has actually resulted.

Second: It is said Thompson was liable because he denied the right of his lessor, and obeyed the direction of Hasselbacher, not to surrender the property. On this point the circuit judge was requested to instruct the jury:

1. That if the jury are satisfied that defendant only refused to deliver the property because so notified by Hasselbacher on an agreement by Hasselbacher to that effect with Moesta, then there is no conversion, and plaintiff cannot recover.

2. That if the jury are satisfied that defendant informed Hasselbacher that Moesta must remove the property or he would charge rent, and Hasselbacher did so inform Moesta, that this is equal to an offer to deliver the property, and rebuts the presumption of any conversion.

Each of these requests was denied. The first, we think, should have been given. There was some evidence of Moesta's assent to the retention of the property by Thompson as Hasselbacher requested, and if he gave such assent, he certainly could not hold Thompson liable in trover afterwards without first withdrawing the assent and demanding the property.

The second should also have been given. There was no evidence that Thompson ever distinctly refused to deliver the property up. If he agreed with Hasselbacher to do so, and even if he informed Moesta of this, it would be going very far to treat such an agreement or such information as being in itself a refusal. But treating it as such, it might still be withdrawn by an offer to give up the property. And though in this case the offer to surrender the property was not made to Moesta directly, but was communicated to Hasselbacher, yet this circumstance is immaterial if in fact it was afterwards communicated to Moesta before proceedings were instituted; and this the evidence tended to show was the case.

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Our conclusion is that the judgment should be reversed, with costs, and a new trial ordered.

CHRISTIANCY, CH. J., and GRAVES, J., concurred.

CAMPBELL, J.

Moesta sued Thompson for the conversion of certain personal chattels leased to him with the privilege of purchasing, but which he did not elect to purchase.

It appeared that the property was subject to a chattel mortgage to Mrs. Hasselbacher, but the date, terms and conditions of the mortgage did not appear,—the fact having been brought out on cross-examination.

After the lease expired, it appeared by the testimony of both parties that Thompson refused to give up the property without Hasselbacher's consent, the latter having directed him not to let the articles go until the mortgage was paid or reduced. A portion of the property was taken away, consisting of an engine and boiler. Certain shafting and a lathe were taken down at the same time, but not removed, and Thompson put them in his yard for a time, where Moesta claims they were exposed to the weather, and afterwards claims to have put them under cover. The lease covered several tools and loose articles also.

The questions presented arise out of certain charges and refusals to charge.

The court, among other things, charged the jury that if Thompson failed to keep and care for the goods as a prudent and careful man would care for his own property, the relation of bailor and bailee was at an end, and the defendant was at the time guilty of the conversion of the property, and the plaintiff could recover in this action without proving any demand. And further charged as follows: "The main question in the case, gentlemen of the jury, as you will see, is whether there was any demand, and that is for you to determine upon the whole case, the whole evidence in the case. Was Thompson willing to deliver up the

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property, or did he refuse to let the plaintiff Moesta have it, or did he place himself in a position where a demand was not necessary?"

It does not appear whether the whole charge was given or not. It is insisted by counsel for defendant in error that the charge in regard to conversion by misusing the property could not have been understood or intended as applying beyond the property misused; and that the latter clause of the general charge was justified by the conduct of Thompson, shown by his own testimony, in denying Moesta's title. If this ground is correct, the other becomes immaterial, and none of the other errors assigned would be important. I think that there is no evidence in the cause which could exonerate Thompson from liability for his denial of Moesta's rights. By the terms of the lease he was bound to restore the property to Moesta as his lessor. It does not appear what the terms of the mortgage were, and it cannot be assumed, without proof, that Mrs. Hasselbacher had, at the time the lease expired, such control as would justify Thompson in obeying her orders in defiance of Moesta. He was bound to return the property, or make out a right to retain it which Moesta would have been estopped from denying. There is no evidence in any way tending to show this, except a statement made by Hasselbacher and denied by Moesta, that Hasselbacher told the latter he must not remove the property from the shop until the mortgage was paid or reduced, and that Moesta replied, "All right," and Hasselbacher told this to Thompson and directed him to let nothing go until the mortgage should be reduced.

There was nothing in this talk, if it was had, which created any agreement, or in any way changed the rights of the parties, and it is not claimed that Moesta joined in giving Thompson any such directions.

As the case stood in the circuit, defendant there admitted he had asserted Hasselbacher's rights as paramount,

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and refused to recognize Moesta's. This was a clear conversion, and no further fact was necessary to give a right of action.—*Caunce v. Spanton, 7 M. & G., 903; 2 Greenl. Ev., § 644.*

I think the judgment should be affirmed.

William Darmstaetter v. John D. Moynahan.

Master and servant: Respondeat superior: Contractor. One who employs another to fill his ice-house by the cord, and obtains license from the municipal authorities to incumber the street for that purpose, cannot shield himself from liability for injuries caused by unlawfully obstructing the street with blocks and fragments of the ice, under an objection that his employe was a contractor and alone liable. *Detroit v. Corey, 9 Mich., 165,* cited and held to be decisive of the question.

Heard April 23. Decided April 29.

Error to Wayne Circuit.

Ward & Palmer, for plaintiff in error.

Alfred Russell, for defendant in error.

GRAVES, J.

The plaintiff in error owned and occupied certain premises in Detroit upon which was an ice-house. Desiring to fill this house with ice, he obtained a license from the city to incumber the public street passing the premises, for the accomplishment of that object. He then hired one Kehl to fill the house, and agreed to pay him therefor two dollars and fifty cents per cord. Kehl in doing this work, left a pile of blocks and fragments of ice (covered with snow), of considerable size, and extending from the premises from six to nine feet out into the street. The defendant in

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error, being out in the evening on a sleigh ride with his family, and passing along this street, and having no warning by light or signal of the existence of this obstruction, ran upon it, whereby his sleigh was upset, and himself and wife injured. He thereupon brought suit against the plaintiff in error and recovered, and the latter now claims that if any one is liable it is Kehl, who, it is urged, was a contractor with the plaintiff in error for putting up the ice, and acting in entire independence of the latter, and holding no such relation to him as to give an action against him for the negligence of Kehl. The jury expressly found that in the contract for putting in the ice nothing was said as to any right in plaintiff in error to control the manner of proceeding. It is admitted that if the relation between Kehl and plaintiff in error was not of that independent character claimed for it, the judgment cannot be disturbed. The case appears to be within the principle declared in *Detroit v. Corey, 9 Mich., 165.*

In the opinion of the majority of the court it was said, that "when the relation of principal and agent, or master and servant, exists, the rule of *respondeat superior* is applicable, but not when the relation is that of contractor only. In all ordinary transactions the relation of contractor excludes that of principal and agent, or master and servant. But there is not necessarily such a repugnance between them that they cannot exist together. The difference between them is, that a contractor acts in his own right and for himself, whereas an agent or servant acts for and in the name of another." The majority of the court considered the city liable upon the ground that while the contractors acted for themselves, they were at the same time, and in respect to the acts complained of, the *agents* of the city. And it was observed that the sole right they had for making the excavation was as agents for the city; since if they had been proceeded against by indictment for creating a public nuisance they could not have justified in their own right, but only as agents of the city under their

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contract. Without pausing to inquire into the application there made of the principle, I am not aware of any objections to the principle itself, and it seems to me to apply plainly and fully to the case before us. The plaintiff in error and Kehl seem to me to stand beyond question in the relation of principal and agent, according to the view taken in the foregoing case.

The business of Kehl was to pack, on the premises owned and occupied by the plaintiff in error, an amount of ice equal to the capacity of the house, and for which he was to be paid an agreed price per cord. The arrangement neither implied nor contemplated that Kehl should be master of the possession, or have any other or further right of entry than such as would be reasonably involved in his hiring to put up the ice; and the plaintiff in error does not appear to have invested him with any exclusive authority as to the style in which the work should be done, or to have waived the right to interpose and direct as to the mode of doing it.

The work was to be done for plaintiff in error, and under the protection of a license given by the city to him as a personal privilege; and it cannot be presumed to have been understood that this license should be used as Kehl might choose, though contrary to its spirit or beyond its import. The license was obtained by the plaintiff in error as his own shield in carrying on a piece of work by and for himself, and the work was done under it by himself by means of Kehl, who was his instrument. If Kehl had been prosecuted for creating a public nuisance, he could not have "justified in his own right," but would have been compelled "to justify as agent" of the plaintiff in error under his contract. I am therefore of opinion that the relations between Kehl and plaintiff in error were such in respect to the creation of the mischievous obstruction as to implicate the latter in responsibility for injuries to third parties not in fault.—See *Sadler v. Henlock, 4 El. & B., 570.*

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This view, if correct, makes it needless to go further, and, by the concession of plaintiff in error, justifies an affirmance of the judgment.

The other Justices concurred.

James Black and another v. Eber B. Ward.

Promissory notes: Payable in Canada, "in Canada currency." A note made and endorsed in Michigan and payable in Canada, "*in Canada currency*," is payable in *money*, and is therefore negotiable; such a phrase in a note made here means no more than that it is payable in Canada money at the Canadian standard, as it would have been without such phrase if made and payable there.

The use of a superfluous phrase of this kind is too common to indicate or permit any inference that it is to change the natural meaning of the instrument; and this is especially so when such forced construction impairs the validity of a contract.

Ignorance of the law. Every one is usually bound as if he had a knowledge of the law, whether he has it or not; but there is no rule which conclusively presumes such knowledge as a fact, where that fact is important. Cases referred to expounding the maxim, *Ignorantia legis non excusat.*

Heard April 23 and 24. Decided April 29.

Error to Wayne Circuit.

John H. Bissell and *Douglass & Miller*, for plaintiffs in error.

T. C. Owen and *Pond & Brown*, for defendant in error.

CAMPBELL, J.

Ward was sued as endorser of a note made and endorsed in Michigan, but payable in Canada, expressly in "Canada currency." The circuit court held it was, upon its face, payable otherwise than in money, and not negotiable. This is the only important question before us.

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There was some testimony given in the court below upon the meaning of the phrase in question, and the argument in this court has covered a very wide range, it being claimed on the one hand, that the note is payable only in paper, and on the other, that the word currency is used only to indicate that it is payable in Canadian, instead of in American money, without any reference to paper or coin specifically. It is also insisted that if payable in paper current at the value of cash, it would still be negotiable.

The endorser's contract being governed by the laws of this state, and the note having been made here, its negotiability must in our courts be tested by our own statute; but as that is like the statute of Anne, in requiring the paper to be payable in *money*, the only inquiry in this regard is, what may be included in that term.

It will be found by examining the authorities, that the word "money" has been used for some purposes in a very wide sense, and for others in a restricted sense. When questions have come up in construing negotiable paper, it has never been extended beyond coin and paper at par value.

In England, in the case of *Miller v. Race, 1 Burr., 452*, which involved the rights of holders of stolen bank of England bills, the language of Lord Mansfield and of the other judges was so pointed in treating such notes as cash, that, if the question now discussed had been mooted, there can be little doubt how it would have been decided. A series of decisions made afterwards sustained tenders in such bills, where no objection had been made to the medium in which the tender was made.—*Polyglass v. Oliver, 2 C. & J., 15, 16; Brown v. Saul, 4 Esp., 267; Wright v. Reed, 3 T. R., 554.* And these decisions have been followed universally in this country.

The first time when the negotiability of a bill payable in bank of England notes came up for decision was in the interval between 1797 and 1818, during which the bank was restrained from making specie payments. The stat-

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notes containing this restriction provided expressly that if the amount of any debt were tendered in notes, the debtor should not be arrested on the debt.—*Tomlyn Law Dic., "Bank of England."* It was held in *Grigby v. Oakes, 2 B. & P., 526,* that under this statute notes were not a legal tender. Reference was made by some of the court to the peculiar terms of the statute, as limiting the effect of the tender to an exemption from arrest. In *Ex parte Davison, Buck, 31, and Ex parte Imeson, 2 Rose, 225,* it was held that notes payable in "cash or bank of England notes," were not negotiable. In 1834 the notes were made a legal tender; but by the present law they are not such in Scotland or Ireland.—*Fisher's Dig., "Bank of England," "Tender."* No case has since been reported in which any such question was raised; and whether the silence of the courts arises from the change of the law, whereby the notes are made equivalent to coin, or from any custom excluding any mention of notes in drawing up negotiable paper, we have no means of judging. Where the notes are always convertible and at par with gold, and are a legal tender, there does not seem to be any very good reason for holding a bill payable in notes to be any more objectionable than one payable in coin. In this country all paper not payable expressly in gold is impliedly payable in greenbacks; and we cannot conceive that it can change the legal character of any security to express in it precisely what the law implies.

Where a promissory note is payable in any thing which is not a legal tender, the authorities are generally, though not universally, against its negotiability. In New York and Ohio, bank-bills issued under state authority, and where the courts hold they are bound to recognize their quality judicially, have been held at par to represent money, so that notes payable in cash or in such notes, have been adjudged negotiable.—*Keith v. Jones, 9 J. R., 120; Judah v. Harris, 19 J. R., 144; Swetland v. Creigh, 15 Oh., 118.* But in the same states, paper payable expressly in any

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other bills, or even in the bills of specified banks of the state, has been held not negotiable.—*Leiber v. Goodrich, 5 Cow., 186; Shamokin Bank v. Street, 16 Oh. St., 1; Thompson v. Sloan, 23 Wend., 71; Little v. Phenix Bank, 2 Hill, 425; 7 Hill, 359.* Elsewhere, except where there are statutes to the contrary, there is no considerable support for the doctrine that paper payable expressly in the bank-notes of private corporations is negotiable.

Under the laws of this state, bank-bills may be levied on, and may be paid over as cash, if the creditor is willing to receive them; but if he refuses, they must be sold "as other chattels."—*Comp. L., §§ 6096, 6456.*

If the term "Canada currency" should be confined to private bank-notes, it would be difficult to hold this paper negotiable. In *Thompson v. Sloan*, the supreme court of New York held that a note payable in Buffalo in "Canada money" was not negotiable. This, however, is not, as we think, in accordance with the general current of decision. Judge Story says, "If it be payable in money, it is of no consequence in the currency or money of what country it is payable. It may be payable in the currency or money of England, France, Spain, Holland, Italy, America, or any country."—*Story on Bills, § 43; Chitty on Bills, 153, 158.* We cannot with any propriety refuse to recognize the right of every country to fix its currency, and it is impossible for any civilized government to exist without some legal standard of money. The only question here is whether a note payable in "Canada currency" is or is not payable in money.

It is claimed on the one side, and denied on the other, that the term "currency" is confined in our usage to paper which is not money. Upon this question many authorities have been cited, and we have examined each of them, with such other references as we have been able to discover, and we are led to the conclusion that there is no foundation for any such doctrine.

The only cases in which it has been held that "currency"

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does not mean money (except where it has been qualified by some further definition), are certain cases in Iowa and Wisconsin, all of which rest entirely upon the authority of decisions where the paper in question was expressly payable in bank-notes. None of these decisions supports the idea that "currency" and "bank-notes" are purely convertible terms, and the inference is unwarranted, unless founded on what does not appear in any of those decisions. The decision in *Wright v. Hart's Admr., 44 Penn. St. R., 454*, that paper payable "*in current funds at Pittsburgh*" was not negotiable, was also rested, without any further discussion, upon the authority of former decisions applicable to paper payable in bank-notes.

In *Dillard v. Evans, 4 Ark., 175*, the term "*common currency of Arkansas*" (in which certain paper was made payable), was held designed to point out a different currency from that which was legal, and to refer to depreciated paper, which was then, in fact, the common medium of business. And in *Farwell v. Kennett, 7 Missouri, 595*, it was held that the insertion of the words "payable in currency" indicated a design to change the legal import which would have been found had no such words been inserted. And in *Conwell v. Pumphrey, 9 Indiana, 135*, the use of the term "current funds" was held for the same reason an intentional variation. Subsequent decisions in each of those states have either overruled these cases, or so interpreted them as not to make them apply to a case like the one before this court. Reference will be made presently to these later decisions.

With these exceptions, the general course of authority is in favor of the negotiability of paper payable in currency or in current funds. And these decisions rest upon the ground that those terms mean "money," as the necessity of having negotiable paper payable in money is fully recognized.

There is, however, some difference in the methods of arriving at this result, and it is proper to refer to the cases which have used careless language, as well as to those

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which have laid down rules cautiously. The fact that the bills of sound banks have been received promiscuously with the legal money of the country has led here, as in England, to remarks from courts based on the assumption,—which is well founded,—that persons usually do not prefer one to the other, and they sometimes speak of payment in either as amounting to the same thing. It is only where the question is directly presented of a tender actually made in one or the other, that discrimination becomes necessary. Thus in *Lacy v. Holbrook, 4 Ala., 88,* where a bill of exchange payable in "funds current in the city of New York" was held negotiable, it was so held because deemed to be payable in cash, in gold or silver coin "*or its equivalent.*" So in *Bank of Peru v. Farnsworth, 18 Ill., 563; Laughlin v. Marshall, 19 Ill., 390; Swift v. Whitney, 20 Ill., 144;* and *Hunt v. Divine, 37 Ill., 137,* promissory notes or certificates of deposit payable in "currency" were held to be negotiable on the same ground; but there is reference made to the equivalence of bank-notes with other money, which are open to the same hyper-criticism that the court confounded real with conventional money. It is to be observed, however, that none of these cases called for any decision as to what would be a legal tender in payment of such notes.

The decisions of other states are less open to remark. In Arkansas, where the rule is strict in denying the negotiability of paper not payable in money (see *Hawkins v. Watkins, 5 Ark., 481, and Dillard v. Evans, 4 Ark., 175*), it was held in *Graham v. Adams, 5 Ark., 261,* that a note payable in "good current money of the state" was negotiable. The court, after some discussion, remark: "A good currency, then, in our opinion, means nothing more than a lawful currency, and that is, current coin of the United States." In *Wilburn v. Greer, 6 Ark., 255,* it was held a note payable in "Arkansas money" was payable in "current coin of the United States," and therefore negotiable. In *Burton v. Brooks, 25 Ark., 215,* it was held a note payable in "greenback currency" was payable in the currency of

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the United States, and not in national or other bank-notes, and that the meaning was the same as if it had been made payable in dollars only.

In Indiana, in *Drake v. Markle, 21 Ind., 433*, it was held the term "currency" meant money, and that a note payable therein was negotiable. This case practically overrules *Conwell v. Pumphrey*, which, as we have seen, was decided on the assumption that parties never use unnecessary words in making negotiable paper.

In Mississippi, in *Mitchell v. Hewitt, 5 Smedes & Marshall, 361*, the note was payable in "currency of the state of Mississippi." The court say that this phrase "can only mean that which has been declared to be a legal tender, because currency implies lawful money." Reference was made to an early Pennsylvania case, *Wharton v. Morris, 1 Dal., 133*, where upon a somewhat similar state of facts it became necessary to define the words of a note. The court there held that "lawful" and "current" were synonymous words, and said the "lawful current money of Pennsylvania," that which was declared to be a lawful tender, and consequently became the legal currency of the land, was the money emitted under the authority of congress. In *Lee v. Biddis, 1 Dal., 188*, it was further held (as must necessarily be the case if courts are to construe such language), that evidence could not be received to give any other explanation.

In Minnesota, in *Butler v. Paine, 8 Min., 324*, currency was held to be lawful money, and the following definition from *Bouvier's Law Dictionary* was approved: "The money which passes at a fixed value from hand to hand; money which is authorized by law."

In Missouri, where, in an earlier case (*Farwell v. Kennett, 7 Mo., 595*), it had been held as it had been in Indiana, that words of surplusage must have a controlling and repugnant meaning, and that a note payable "in currency" was not payable in money, it was distinctly held in *Cockrill v. Kirkpatrick, 9 Mo., 688*, that paper payable in "*currency*

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of Missouri" was payable in lawful money of the United States, and that Missouri currency could mean nothing else.

In Tennessee, it was held in *Searcy v. Vance, 1 Mar. & Yerg., 225*, that paper payable in "Tennessee money" was only payable in gold and silver, and that those words would not include bank-notes. The same state holds paper payable in current bank-notes of Tennessee, or in such notes generally, not to be negotiable.—*Kirkpatrick v. McCullough, 3 Humph., 171; Whiteman v. Childress, 6 Humph., 303; Simpson v. Moulden, 3 Coldw., 429; McDowell v. Keller, 4 Coldw., 258.*

In Louisiana, it was held in *Fry v. Dudley, 20 La. An., 368*, that a bill of exchange payable "in currency" is payable in legal current money, and a person who receives such a bill for collection is not authorized to receive payment in any thing else.

In *Ehle v. The Chittenango Bank, 24 N. Y., 548*, a dividend "payable in New York state currency" was held payable in cash. And it was held incompetent to inquire of a cashier what he understood that phrase to mean. The court say: "The term 'New York state currency' must be held to mean what the ordinary signification of those words implies, unless *by some general known usage* some other technical meaning can be attached to it."

We have been referred to the case of *Gray v. Worden, 29 Q. B. Reports (Upper Canada), 535*, as bearing adversely on this point. That case decides that a note payable "*in Canada bills*" is not negotiable, even though construed to mean government legal tender notes. It is based upon the decisions made in England and America relative to paper payable in bank-notes, and holds the official notes as mere promises to pay money, and not as money. That doctrine would not be admissible under our legal tender laws. But the case is chiefly relied on for some remarks it contains distinguishing the word "currency" from "money."

It seems to have been supposed by counsel that this distinction was the same as that between bills and money,

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or in other words, that currency and bills are synonymous. This is an evident misapprehension. The language used is this: "There is a difference between money and currency. In *Lansdowne v. Lansdowne, 2 Bligh, O. L., 78,* Lord Redesdale said in 1820: 'There is no lawful money of Ireland. It is merely conventional. There is neither gold nor silver coin of legal currency; nothing but copper. There is no such thing as Irish money; it is Irish currency.' —See also *Kearney v. King, 2 B. & Ald., 301; Sprowle v. Legge, 1 B. & C., 16.*"

The distinction which the Canadian court points out is not one between paper and coin, but between the values of money in different countries. In the cases referred to it appears that the difference between the Irish pound sterling and the English pound sterling was such that twelve English pounds were equivalent to thirteen Irish pounds. In like manner a Canadian pound represents only four-fifths of an English pound, and the old New York pound was but two dollars and a half,—the York shilling being twelve and a half cents, the Canadian shilling twenty cents, and the British shilling nominally taken at about twenty-five cents. The pound in Jamaica is *five*-sevenths of the English pound. —*Scott v. Bevan, 2 B. & Ad., 78.* Judge Story has collected some learning on this subject in *Confl. of Laws,* §§ *308 to 313.* See also *Taylor v. Booth, 1 C. & P., 286; Cope v. Cope, 15 Sim. 118.*

In *Macrae v. Goodman, 10 Jur., 555, 5 E. F. Moore, 315* (*6 Harr. Dig. 690*), a similar consideration came up in regard to "*Holland currency,*" where that term was used in a contract made in Guiana, the colonial guilder being different from the Dutch guilder.

In *Lansdowne v. Lansdowne* the question was, whether under a marriage settlement a rent charge on lands in Ireland was payable in English currency, that is to say, whether the annuity of three thousand pounds was to be in English pounds sterling or at a less rate. The currencies of Ireland and England have, it is said, been equalized since that decision. But there was not then, as remarked by

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Lord Redesdale, any Irish coinage, and the difference was merely one of computation.

Similar differences may at any time arise between the coinage of various countries as they change their standards. The dollar of one country may be, and probably is sometimes, different in intrinsic value from that of another. The "currency" spoken of in the Canadian decision is the measure of value. It is in this sense that Lord Redesdale speaks of currency in Ireland.

A note payable in Canada currency means no more and no less than that it is payable in Canada money at the Canada standard, and that it is governed as to the amount it calls for, by the same rule as if it had been made in Canada, and payable in so many dollars, without containing any further direction.

It is evident the language was used to exclude the idea that it should be paid in dollars according to our paper standard, and to put it on the footing of a gold contract.

It is urged that this is superfluous, and that as every one is presumed to know the law, it would not have been put in except for some purpose which would change its legal import. This objection appears to us to be far fetched and unreasonable. The cases cited above sufficiently answer it. A very large proportion of the bonds and deeds drawn up in this country describe the money secured or paid, as "lawful money of the United States," when there can be no other lawful money in the republic, and when it is clearly superfluous.

But the maxim referred to in regard to a knowledge of the law is misapplied. No man can avoid a liability, as a general thing, because he is ignorant of the law. This is an essential rule of society. But the law is not so senseless as to make absurd presumptions of fact. In *Regina v. Mayor of Tewkesbury, L. R., 3 Q. B., 628*, this supposed maxim was very clearly explained, and it was held that where an actual knowledge was in question, the legal presumption could not supply it. *Blackburn, J.*, uses this language:

"From the knowledge of the fact that Blizard was

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mayor and returning officer, was every elector bound to know as matter of law that he was disqualified? I agree that ignorance of the law does not excuse. But I think that in *Martindale v. Falkner, 2 C. B., 719, Maule, J.*, correctly explains the rule of law. He says: 'There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason, if it were so.' In *Jones v. Randall, Cowp., 38, 40, Dunning, arguendo*, says: 'The laws of this country are clear, evident, and certain; all the judges know the laws, and knowing them administer justice with uprightness and integrity.' But Lord Mansfield, in delivering the judgment of the court, says: 'As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is even in the last resort.' It was a necessary ground of the decision in that case that a party may be ignorant of the law. The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract. There are many cases where the giving up a doubtful point of law has been held to be a good consideration for a promise to pay money." The learned judge proceeds further to the same effect, and the judgment of the court in that case, as in the one cited from Lord Mansfield, rested upon the sole ground that a person was not presumed as a matter of fact to know the law relied on to disqualify him as a voter.

In the present case we are asked not only to presume conclusively that the maker and endorser of the note in suit knew the law, but also that by inserting expressly what the law would have implied, they must be presumed to have meant something else. This would not be a reasonable presumption. It is a very natural thing for men to make their meaning stronger by excluding possible inferences, and

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by expressing what they wish, and not leaving it to implication.

It is worthy of remark that Judge Story in his Conflict of Laws, originally laid down the doctrine that such a note as this, made here and payable in Canada, would in the absence of any words to the contrary, be payable by the American standard.—*Confl. L.*, §§ *271*, *271 a.* But he subsequently added a section making the place of payment control in the absence of any thing to the contrary.—§ *272 a.* It is not strange that persons contracting for a payment abroad, where the foreign law is certainly not presumed to be known here, unless by a presumption much further removed, should prefer to make their papers intelligible on their face.

We hold the note in controversy to be a note payable in Canada precisely as if it had been made there without qualification, or in other words, to be payable in the lawful money of Canada.

Where words bear a natural and known legal meaning which will maintain the validity of a contract, it would be mischievous to permit evidence to give a meaning which would destroy it. Negotiable paper is intended to circulate generally, and not in confined localities, and if there should happen to be a meaning in one place which differed from that elsewhere, a purchaser would be defrauded without remedy if he were compelled to go behind the terms of the security. If parties desire to give a confined meaning, it is easy to express it. If they choose to make notes payable in chattels, they should say so. But the language used here is in our opinion too plain to be perverted, and there is no reason to believe the maker of the note meant any thing but what he said.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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Alexander Murray v. Christopher Moross.

Landlord and tenant: Covenant to keep in repair: Charge to the jury. In an action upon a covenant in a lease to keep the premises in repair during the term, and at the end thereof to deliver them up in like condition as when taken, reasonable use and wear thereof and injury by the elements excepted, it is not error to charge the jury that the defendant had no right to remove a box stall he had put up in the barn on the leased premises, if the removal would injure the freehold.

Heard April 24. Decided April 29.

Error to Wayne Circuit.

Browne T. Prentis, for plaintiff in error.

O. Kirchner, for defendant in error.

COOLEY, J.

Moross sued Murray for breach of covenant contained in a lease, by which Murray had bound himself to keep the premises and every part thereof in good repair during the continuance of the lease, and at the end of the term to yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and injury by the elements excepted. It appeared on the trial that Murray had put up a box stall in the barn for the occupation of his horses, and had afterwards torn it out again. There was some evidence that the necessity for putting it in was occasioned by injury the horses had done the barn, and testimony was given to show that it could not be taken out and leave the barn in like condition as before. The court charged the jury that Murray had no right to remove the box stall if the removal would injure the freehold, and this in substance was given in various forms with explanations.

The charge was correct. Murray could not surrender the premises in like condition as before, if he tore out improvements and necessarily caused an injury by so doing.

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Another point is made by the brief of plaintiff in error, but as there is nothing in the record to show how it bears upon the present case, or whether it bears at all, we pass it by.

The judgment must be affirmed.

The other Justices concurred.

Augustus P. Tucker and another v. Hiram A. Tucker and another.

Mortgages: Use of a horse and buggy. The allowance made by the court below for the value of the use of a horse and buggy under a stipulation secured by mortgage made by a son to his parents, to furnish the same as required, will not be disturbed except upon clear and satisfactory showing that it is unreasonable.

The arrangement must be presumed to have been made in view of the existing relations of the parties, and subject to such conditions as might naturally arise in their daily business and exigencies, and could not be properly so construed as to require obedience to the caprices or unreasonable demands of the mortgagee.

Heard April 24 and 25. Decided April 29.

Appeal in Chancery from Branch Circuit.

This was a bill to foreclose a mortgage given by Hiram A. Tucker to his parents (the complainants) to furnish them a house and maintenance, and the use of a horse and buggy, and to perform some other conditions. The case was before this court at the April term, 1872 (see *24 Mich., 426*), and was then remanded to the court below to proceed to an inquiry to ascertain and determine the amount of compensation which should be allowed to the complainant, Augustus P. Tucker, for the failure to furnish him the use of a horse and buggy, and upon such ascertainment and determination to make the usual decree of foreclosure and

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sale to satisfy the amount found due, with costs of both courts. The cause was accordingly referred by the court below to a commissioner, who reported finding due the complainant the sum of two hundred and seventy-three dollars, being at the rate of one dollar and fifty cents a week. This report was confirmed, and decree entered in accordance with it. From this decree the complainant, Augustus P. Tucker, appealed.

Ward & Palmer, for complainants.

N. P. Loveridge, for defendants.

PER CURIAM. We think the allowance made by the court below was reasonable.

The stipulation for the use of a horse and buggy is, in its terms and in its application, extremely indefinite, and it is quite impossible to settle the amount to be paid under it without resorting somewhat to probabilities. The meaning of the parties can only be approximately ascertained by considering the general nature of the arrangement, the position and relation of the parties, their condition in life, and what must have been contemplated by all concerned.

The arrangement was a family one, and made between a son and his parents. The parties were farmers, residing in the country, and in fair circumstances, and it is reasonable to conclude that all anticipated such attentions and accommodations as were usual in such cases.

It could not have been imagined that a horse and buggy, and a servant to harness and unharness, would be hourly or even daily required throughout the year. Neither could it have been imagined that an expense would be necessitated every year exceeding the value of a first-class establishment.

The position of appellant, however, leads to this latter result. Upon the whole, we think the amount found by the court below is perhaps as near the equity and justice

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of the case as possible, considering the vague nature of the arrangement and the impossibility of obtaining data for precise results.

In view of the probability that inquisitions may be hereafter required, and as these must be attended with expense, we think it well to suggest that should it appear that defendant, before the inquiry, has reasonably tendered to complainant an amount equal or exceeding the sum found due, that circumstance would justify the court in requiring the costs of the particular inquiry to be charged against complainant and deducted from the amount found.

The order below must be affirmed, with costs.

Frank Giddey v. Ida Altman.

Contract construed: Right of possession. A contract for the sale of a piano upon condition of the delivery by the purchaser to the vendor in payment therefor of certain tickets of subscription for a newspaper and to a premium drawing, the vendee agreeing to repurchase, at a price specified, all such tickets that remained unsold after a day named, and the vendor to use reasonable exertion to sell the same in the meantime, which provides that the piano "is to remain the property of the vendor and subject to his directions, and not to be moved from place to place without his written assent until all of the conditions herein specified are fulfilled;" and that in case of default in any of the conditions, the vendor "may declare this agreement void and take possession of the piano wherever found, without legal process, and retain payments made, as damages for non-performance," etc., does not give the vendor the right of possession until he has exercised his right to declare the contract of sale terminated; and his tendering the tickets back, and on payment being refused, putting them into the hands of an attorney for collection, could not operate to give him the right of possession.

Replevin: Right of possession: Title. In an action of replevin by one claiming under the vendees in such contract against vendor's agent, who had taken possession without a previous demand, the judgment below in favor of the plaintiff will not be disturbed, because of a ruling that this contract transferred the title to the vendees, in the absence of any showing that the vendor had taken any steps to declare the contract void, whether the ruling be correct or not.

Heard April 25. Decided April 29.

Error to Wayne Circuit.

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Moore & Griffin, for plaintiff in error.

H. L. Baker and *Theodore Romeyn*, for defendant in error.

COOLEY, J.

On the eighth day of December, 1871, the following instrument was executed by the parties therein named:

"This agreement, made and entered into this eighth day of December, A. D. 1871, between Fletcher Benedict, of the city of Pontiac, in the county of Oakland, in the state of Michigan, and C. W. Armstrong & Co., of the city of Detroit, county of Wayne, and state of Michigan, witnesseth: that whereas, the said C. W. Armstrong & Co. have this day agreed to purchase from the said Fletcher Benedict one piano-forte, of the manufacture of G. A. Miller & Co., Boston, Mass., No. 5, upon the terms and conditions following:

"The said C. W. Armstrong & Co., in payment for said piano, hereby deliver and transfer to the said Fletcher Benedict four hundred subscription tickets for the newspaper known and published in the city of Detroit as *Our Mutual Friend*, together with the premiums drawn by said tickets, on the day such distribution shall take place; and we, the said C. W. Armstrong & Co., hereby agree and obligate ourselves, for and in consideration of the premises, to repurchase from said Fletcher Benedict, paying therefor the sum of one dollar and seventy-five cents each, in cash, all the tickets that shall remain in the hands of the said Fletcher Benedict, not disposed of and unsold, of said four hundred tickets, on the fifth day of March, A. D. 1872. And it is hereby further agreed by the said Fletcher Benedict, that he shall use all reasonable exertion and diligence to sell and dispose of said subscription tickets; it being expressly understood and agreed that the said instrument is to remain the property of the said F. Benedict, and subject to his directions, and not to be moved from place to place without his written assent until all the conditions herein

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specified are fulfilled. It is further agreed in case of default in any of the conditions above stipulated to be performed, that the said F. Benedict may declare this agreement void, and take possession of the said instrument wherever it may be found, without legal process, and the payments that shall have been made may be retained to apply as damages for the non-performance of this agreement. I also agree to have this said instrument fully insured for the benefit of said F. Benedict, and that the policy will remain in his hands until the instrument is fully settled for."

Armstrong took possession of the piano as contemplated by this instrument, and afterwards, but at what precise time does not appear, sold it to one Beard, who, in May, 1872, sold it to Mrs. Altman. It is not disputed that Mrs. Altman bought in good faith, and without knowledge or suspicion that Beard's title was defective.

Benedict did not succeed in selling more than ten or twelve of the tickets he received from Armstrong & Co., and it is claimed by him that on the fifth of March, 1872, he tendered back to Armstrong the unsold tickets, and that the latter refused to take them. Benedict then left the tickets with an attorney "for collection," whatever that may mean.

Some two months after Mrs. Altman bought the piano, Benedict got Giddey to go with him to Mrs. Altman's house, and without previous demand, and in her absence, they took possession of the piano, and carried it away with them to Giddey's house. Mrs. Altman, on returning home and finding what had been done, sued out a writ of replevin. On the trial of the replevin suit in the circuit court she has succeeded, and the case is now before us on writ of error.

The question which the record presents is, whether on the face of the instrument entered into by Armstrong & Co. and Benedict, and on the facts stated, the latter was entitled to possession of the piano. He claims that he was,

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because by the express terms of the instrument the sale was conditional, and the title and right of control remained in him until he had realized the full purchase price from the tickets.

The agreement between these parties was very peculiar, and it is not easy to determine precisely what their understanding was. The first clause in the writing implies an executed sale, and the delivery and transfer by Armstrong & Co. to Benedict of four hundred subscription tickets in full payment. If the case were to turn upon this clause, there could be no question whatever that the sale was absolute. Nor does the provision a little further on indicate a different understanding. If Benedict does not succeed in selling all the tickets, Armstrong & Co. agree to purchase back what are unsold; an agreement clearly implying that the title to the tickets was to be in Benedict, and consequently that the title to the piano was to be in Armstrong. Then follow provisions upon which Benedict relies, and which indicate a different intent. It is agreed that the piano is to remain the property of Benedict, and subject to his directions, and not to be moved from place to place without his written assent until all the conditions of the instrument are fulfilled, and that in case of default, Benedict may declare the instrument void, take possession of the piano, and retain all payments made, as damages for non-performance. This seems to be a very clear declaration of the understanding of the parties that the transaction was not to be an absolute and unconditional sale.

But while so much is clear, it is also apparent that Benedict parted with the possession, and the parties undertook to provide what should be done in respect to it thereafter. The piano was to be subject to his direction, and not to be moved from place to place without his written assent. This clause, standing alone, might imply that he was at all times to have a right to take it into his own possession; or it might, on the other hand, evidence an understanding that although Armstrong & Co. were to have

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possession, Benedict might determine where it should be kept, so that, if the agreement should eventually be declared void, the piano should be where he could conveniently assert his claim to it. But it is important as bearing upon the construction, that the agreement imposes no penalty upon Armstrong & Co. for failure to observe this stipulation. It is not agreed that if they shall remove the piano without consent, Armstrong & Co. shall forfeit their right thereto, or that Benedict may retake possession, or that any other specified consequences shall follow. This stipulation would, therefore, seem to be a mere promise, a breach of which would result in no forfeiture of rights, though it might be the foundation of an action for the recovery of damages.

So far, it will be perceived, Benedict has not by the contract reserved to himself a right to retake the possession which he transferred to Armstrong, unless the words "the said instrument is to remain the property of said Benedict" will of themselves have that effect. Unquestionably to stipulate that one shall have the property in a chattel, is, if nothing more is said, to stipulate that he shall have the right of possession also. But in this case, by the same writing the possession was transferred to another, and it only remains to see how far it is consistent with this writing, that the possession under any circumstances may be retaken.

Assuming for the purposes of this case that Benedict's theory is correct, and that this writing evidences only a conditional sale, it would naturally be expected that if Benedict was at all times to have a right of possession, any stipulation on the subject designed to put the right beyond question would refer to a time previous to his declaring the sale void, rather than afterwards; because previous to that time there would be inferences more or less strong that the possession given to the purchasers was to remain in them, while after that time the inferences would be the other way. And if we find in this case that Benedict

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has been careful to require a stipulation for possession after his title shall have again become absolute, but has demanded none for the previous period while Armstrong & Co. still retain rights in the property, the conclusion will be natural, if not irresistible, that the putting an end to the contract by Benedict was to be a condition precedent to a restoration of his right to possession.

And this is what we find in this contract. It is agreed that when Benedict shall see fit to declare the contract void for failure in performance on the part of Armstrong & Co., he shall have the right to retake possession; but it is not agreed that he shall have the right on other condition, or under other circumstances. The natural and most obvious construction of the instrument would therefore seem to be, that Armstrong & Co. were to have possession of the piano until the sale should be declared void for their default, and then Benedict should be restored to all his former rights. Meantime, before default, Armstrong & Co. agree that Benedict, in anticipation of a possible forfeiture, shall have a right to direct where the piano shall be kept, but no penalty is attached to this agreement beyond what would follow the breach of an ordinary contract, and Armstrong & Co. would therefore lose no right in the piano, and Benedict gain none, by its being moved from place to place contrary to the provisions of the contract. The conclusion is, that Benedict was not entitled to possession of the piano when he took it, unless he had previously exercised his right to declare the contract of sale terminated.

There is nothing to show that he had exercised that right, unless the tender back of the tickets was sufficient; but this tender he waived when he subsequently put the tickets into the hands of an attorney for the purpose of collecting the money which they nominally represented. He must be regarded, therefore, as still treating the agreement of sale as in force.

The circuit judge charged the jury that the agreement

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of sale transferred the title to Armstrong & Co. It is not necessary for us to decide whether this instruction was correct, as we think Mrs. Altman had the *prima facie* right, and that the defendant below, by failing to show that the sale had been declared void, wholly failed to establish a defense. The judgment should therefore be affirmed, with costs. But we have not deemed it proper to give an interpretation to the agreement further than was necessary to dispose of the questions on the present record, as it is obvious that different questions might possibly arise should there be further controversy, which might depend for their solution more or less on facts not now before us.

The other Justices concurred.

Robert Hadden and another v. George E. Shortridge and others.

Partnership: Evidence. The unity of interests in plaintiffs who claim as partners, is not necessarily to be shown by direct proof: it may be established by circumstances; and where the circumstances shown have some tendency to prove the fact, and the question has been properly left on the evidence to the jury, their verdict will not be disturbed on error upon the ground of the insufficiency of the evidence.

Evidence: Hearsay: Incompetency: Irrelevancy. Judgment will not be reversed because hearsay evidence that is not irrelevant has been admitted without objection at the time; by allowing such evidence to be introduced without objection a party treats it as competent, and is thereby precluded from raising the question on error.

Heard April 25. Decided April 29.

Error to Oakland Circuit.

Minock & Baker, for plaintiffs in error.

B. L. Ransford, for defendants in error.

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HADDEN v. SHORTRIDGE.

GRAVES, J.

The defendants in error sued as co-partners and alleged their firm name to be "Shortridge, Rutherford & Co." Judgment passed in their favor in the court below, and a revision is claimed in this court on a bill of exceptions. The only question in the case is whether the court erred in giving the case to the jury upon the evidence relating to the connection of the plaintiffs as partners. A witness testified that he knew they were partners from having been in their place of business, from having received letters from them as partners, and from having done business with them as partners, and from reputation. On cross-examination he further stated that he had never seen but two of the plaintiffs, that all he knew about their being in partnership was that one of them stated to him that the persons mentioned were partners and constituted this firm, and that the plaintiffs also wrote to him that they were in partnership. This testimony was all put in without any objection, and the court charged the jury that unless they were satisfied from the evidence that the plaintiffs were partners in business, the verdict should be for the defendants. This was correct. The testimony introduced without objection was certainly relevant, and we cannot say it had no legal tendency to prove the fact. It was sufficient to be passed upon by the jury, who were the proper triers of its sense and weight.—*Drake v. Elwyn, 1 Caines' Rep., 184; 2 Saund. P. & Ev., 705.* The unity of interests in the plaintiffs is not necessarily to be shown by direct proof. It is competent to establish the fact by circumstances. It has been held that the power of one member to subscribe the firm name as accommodation sureties for a third person may be so proved. —*Butler v. Stocking, 4 Seld., 408;* and in *Weed v. Carpenter, 10 Wend, 404,* it was decided that such proof was competent in a suit against an indorser of a note to show that the indorsement which appeared to be in the hand-writing of the maker was authorized by the alleged indorser.

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The circumstances in the case before us afforded some evidence leading to the conclusion that the named plaintiffs composed the alleged firm, and there was nothing to contradict or impair it. It was proper for the jury to interpret it and judge of its sufficiency to satisfy their minds. We are not to be understood as intimating that evidence of reputation or hearsay, if objected to, is admissible to prove a partnership. But in allowing it to be introduced in this case without objection, the plaintiffs in error treated it as competent, and they are precluded from making the point in this court that it was not.

The judgment should be affirmed, with costs.

The other Justices concurred.

Hugh McCurdy v. Joseph R. Bowman and another.

Equity pleading and practice: Appeal: Notices: Service. An appeal in chancery in a case where the evidence has been taken in open court will not be dismissed for the reason that the notices of appeal and of settling a case upon the evidence were served upon the appellee in person instead of his solicitor of record, where he is himself a solicitor of the court and has taken part in the management and trial of the cause and made no objection to the service at the time.

Heard April 29. Decided April 30.

Appeal in Chancery from Shiawassee circuit.

Motion by complainant (appellee) to dismiss the appeal.

Theodore Romeyn, for the motion.

C. A. Kent, contra.

PER CURIAM.

Motion to dismiss an appeal in chancery in a case where

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the evidence had been taken in open court, for the reason that the notices of appeal and of settling a case upon the evidence, had been served upon the complainant (appellee) in person, instead of his solicitor of record.

It appearing, however, that the complainant was himself a solicitor of the court and had taken part in the management and trial of the case, and that when the notices were served upon him, he made no objection to such service being made upon himself instead of his solicitor, which, if made, would have enabled the solicitor for the appellant at once to have corrected the error and made the service upon the solicitor: *Held*, that his own conduct, having tended to mislead the appellant's solicitor into the belief that such service was satisfactory, complainant cannot now object to the validity of the notice for the purpose of dismissing the appeal or invalidating the case settled upon such notice.

Motion denied.

Daniel J. Campau v. Jacob S. Traub and another.

Stipulation: Testimony: Cross-examination. Under a stipulation that the "testimony" of a witness who was examined and cross-examined on a former trial, as the same was taken down by the official stenographer, might be used in evidence, it is error to exclude the cross-examination after having admitted the direct, even though at the request of the party who had conducted such cross-examination.

Practice in supreme court: Error: Prejudice. While it is the duty of the party who complains of error to show its existence, it generally devolves upon the other party, on whose motion the error was committed, to show, if he so claims, that the complaining party was not prejudiced by it.

Rent: Receipts: Evidence: Relevancy. In an action to recover rent, receipts for rent for certain months preceding those for which recovery is sought, standing by themselves and unconnected with the case by any other evidence, are irrelevant.

Heard April 23. Decided May 6.

Error to Wayne Circuit.

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CAMPAU v. TRAUB.

Henry M. Cheever, for plaintiff in error.

Alfred Russell, for defendants in error.

COOLEY, J.

This is a suit brought by the lessor against his lessees to recover two months' rent. It was tried once before, and Daniel J. Campau, Jr., was then a witness for the plaintiff, and his examination and cross-examination were taken down in writing by the official reporter. For a second trial it was stipulated by the parties in writing that the "testimony" of said witness, thus taken on the former trial, might be used in evidence. When, however, the written evidence had been offered and the direct examination had been read, the defendants' counsel stated they did not want the cross-examination, and objected to its being read. The plaintiff claimed a right to have it read, but the court excluded it.

The ruling was erroneous. The stipulation covered the whole testimony, and the plaintiff had a right to the whole. Indeed, in this court no serious attempt has been made to support the exclusion; but it is insisted that the judgment cannot be reversed on that ground, because the bill of exceptions does not set out the cross-examination as taken down, so that we may see whether the defendants were injured by the exclusion; and consequently we cannot see that an error was committed to their prejudice. But while it is unquestionably the duty of a party who complains of error to show its existence, it generally devolves upon the other party, on whose motion the error was committed, to satisfy the court that the complaining party was not injured by it. And when legal evidence once taken in the case and presumptively relevant to the issue, is excluded, we cannot assume that the party offering it was not injured by the exclusion, when we have no better basis for the assumption than the fact that the excluded testimony was the cross-examination of his own witness. The testimony

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on cross-examination often has an important bearing on the testimony in chief, either by way of qualification or of supplement; and as pointed out in *Wilson v. Wagar, 26 Mich., 452*, is to be regarded as part of the testimony given on behalf of the party calling him, and may be highly important to his interest. We cannot, therefore, say that the error was immaterial.

It is also assigned for error that the court erred in refusing to allow the plaintiff to put in evidence certain receipts which defendants had taken for the rent for certain months preceding those for which recovery was sought in this suit. The relevancy of these receipts to the issue being tried does not appear. In connection with other evidence they might have had some tendency to explain the papers which were put in evidence by defendants to prove payment of the demand sued for; but by themselves they would seem to be, as the court held them, irrelevant.

It follows from what has been said, that the judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Daniel Sheahan v. Mary Barry.

Breach of promise to marry: Damages: Seduction. Seduction may be proved in aggravation of damages in an action for breach of promise to marry.

Breach of promise to marry: Seduction: Incontinence: Damages. When a man breaks off an engagement after he has seduced the woman, and does so on grounds furnishing no excuse or reason, if he on the trial produces evidence of her previous incontinence before or during the engagement, of which he had no knowledge or suspicion before he broke it off, such evidence, if believed, will go in mitigation only, and not in bar of damages.

Charge to the jury: Physical symptoms: Question of fact. A court cannot charge as a question of law upon inferences to be drawn from physical symptoms. If they are intelligible without medical testimony, they are for the jury and not for the court to interpret.

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SHEAHAN v. BARRY.

Breach of promise to marry: Marriage. Marriage by one of two engaged persons to a third person is a breach of promise which puts it out of his power to perform the engagement, and is therefore of itself an immediate ground of action.

Charge to the jury: Sympathy. A court cannot be required to direct the jury not to be governed by their sympathies, but to disregard them, where they are sufficiently cautioned that they must be governed by proof.

Jury: Special questions. The jury cannot be required to find specially upon any question the answer to which would in no way affect a general verdict.

Statute construed: Stenographer: Charging juries. The act providing a stenographer for Wayne county (*Comp. L. 1871, § 5034*) is valid, and controls sections one and four of the former act (*Comp. L. 1871, §§ 5023–5026*) concerning the charging of juries. The circuit judge of Wayne county has the same power as before the earlier act was passed to charge fully and orally.

Charge to the jury: Credibility of witness: Judge's opinion. It is not error which will require the reversal of a judgment, that a circuit judge indicates his views as to the credibility of a witness, if he expressly directs the jury to decide for themselves without reference to his views.

Heard April 25 and 29. Decided May 6.

Error to Wayne circuit.

Minock & Baker, George H. Prentis and *Ashley Pond*, for plaintiff in error.

Moore & Griffin and *J. Logan Chipman*, for defendant in error.

CAMPBELL, J.

The suit below was brought for breach of promise and seduction, and a verdict was rendered for damages.

It is now claimed that it was incompetent to allow evidence of seduction in aggravation of damages.

It was hardly questioned that the practice of allowing such testimony has been general, and the cases opposed to it are not numerous. It is claimed, however, that these cases stand on better reason, and that the proof should be excluded, *first*, because the parties are *in pari delicto*; and, *secondly*, because a separate action will lie for seduction. The authorities mainly relied on in aid of this defense are *Burks v. Shain, 2 Bibb, 341; Weaver v. Bachert, 2 Penn. St., 80;* and *Perkins v. Hersey, 1 R. I., 493.*

We do not think the objection that the parties are

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equally in fault is legally tenable. The whole law concerning the action for seduction, and the criminal proceeding for the same offense would be inconsistent with this theory. The common sense of mankind has approved the rules which hold the seducer responsible. The proposition that he is rightly liable is one of those plain maxims which no amount of reasoning will vindicate more clearly than the natural sentiments of humanity; but it has always been recognized as a sound rule at common law, and the ingenious attempts of some judges to demonstrate its unsoundness have produced very little impression. Where popular opinion and legal usage have been so long in harmony, and the heavy verdicts generally given in aggravated cases show the profound conviction which men generally have of the evil deserts of such offenders, we do not feel called upon to search out any new arguments to maintain a doctrine which seems to us as reasonable as it is well settled by practice and decision.

The objection that the damages should not be allowed in an action for breach of promise rests on a different principle, but we think it is equally unfounded. The common-law practice is substantially uniform in allowing it. The seduction which is allowed to be proven in these cases is brought about in reliance upon the contract, and is itself in no very indirect way a breach of its implied conditions. Such an engagement brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee, or guardian, or confidential adviser, who cheats a confiding ward, or beneficiary, or client, into a losing bargain. It only differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance and the mortification

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and pain consequent on the rejection. But in case of seduction there is added to this a loss of character, and social position, and not only deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong; but a refusal to marry makes the seduction a very grievous element of injury, that can not be lost sight of in any view of justice.

We think the common-law practice, which, so far as we know, has never before been questioned in this state, is based on sound principles. The recovery of damages by the injured woman was not at common law affected one way or the other by the right of her friends to sue for seduction. Although the damages they recovered for loss of service were allowed to be much larger than the value of wages could have been, they were nevertheless, in legal contemplation, the damages of the master or parent, and not of the woman. And if she was not in the employment or guardianship of any one, there could be no suit where there was no service; and unless the damages from seduction were considered in an action for breach of promise, they could not in such case be considered in any action on her behalf. No rule can be just which does not give the injured person the full damages resulting to herself from her injury; and this was done in an action for breach of promise, as it was not done for her in any other action.

But it is claimed that our statutes having provided that recovery can be had for seduction without any showing of service, the reason for the old rule has ceased. As the law now stands, the suit may be brought by the parent or guardian of the minor, or by any relative who may be selected and authorized by a woman of full age.—*Comp. L.*, § *6195.*

Assuming that these damages now belong to the woman, (a point on which no decision has yet been called for), as

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they certainly should, there may be many cases where no such relative can be found, or none who will assume the litigation. The rule of damages in one action ought not to vary with the possibilities of another, and if the damages are properly recoverable in one suit for breach of promise, they should be recoverable in all like cases.

There are two considerations in the way of holding the rule changed by our statute. If it gives a remedy to the woman herself, it should, on common-law principles, be regarded as a cumulative remedy,—so far as the seduction under promise of marriage is concerned,—rather than as superseding the old one. And it is better for all parties, and more consonant with public policy, that where justice can be fully accomplished in one suit, no one should be driven to begin more than one.

And where this rule is respected, there can be no danger of injustice by a second prosecution. The maxim that no one shall be twice vexed for the same cause of action will always prevent any plaintiff from suing twice for the same damages. If they can be recovered in this action under the pleadings, a recovery in this will necessarily be a bar to any future action. This subject was recently considered in the case of *Leonard v. Pope, supra, p. 145.*

We think there was no error in receiving evidence of the seduction and in allowing it to be considered in aggravation of damages. The authorities were so fully cited on both sides that we do not deem it necessary to repeat the citations. We regard the law as settled by the common-law practice, and as not changed by statute.

The remaining errors relied on upon the argument relate to the rulings of the circuit judge in his charges and refusals to charge.

Defendant below asked the court to charge that if it should be found the plaintiff had sexual intercourse with any other person than the defendant before the alleged breach of promise, and which was unknown to the defendant, then the jury, even if they should find for the plain-

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tiff, should consider that fact in mitigation of damages, and the plaintiff should recover no more than mere nominal damages.

The court charged as requested, that it should be considered in mitigation, but refused to charge the damages must be merely nominal.

Upon the argument it was claimed that in such case there could be no recovery at all. And this is perhaps a more correct claim, for there can be very few, if any, actions of this nature where any thing that would in law preclude more than nominal damages, would not be a complete justification.

But we think the ruling was correct. There was evidence introduced attempting to prove plaintiff's incontinence with another about the time of the alleged seduction, and after the promise of marriage. There was also evidence from which it was claimed the jury might infer previous incontinence. It was not claimed that the engagement had been broken off on account of a discovery or suspicion of such misconduct.

Such misconduct after an engagement may very well be regarded as a violation of the woman's promise, and may generally, at least, be an entire defense to an action for breach of promise. It is not necessary to decide in this case how far the protection should extend, according as the defendant himself may or may not be in fault. But the law is not so cruel as to deny to a woman who has gone astray the power to return to virtue. It has been held by this court that the seduction of such a woman, who has retrieved her character, is legally possible, and legally punishable.—*People v. Millspaugh, 11 Mich., 278.* It has also been held that a marriage cannot be avoided on the ground of ante-nuptial incontinence.—*Leavitt v. Leavitt, 13 Mich., 452.* If a person who has promised marriage discovers that his proposed wife has been guilty previously of unchaste conduct, which has been concealed from him, he may, unquestionably, if his own conduct has been fair, break off

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the engagement and be legally justified. But where he breaks it off on some other insufficient ground, or for no reason at all, and where he has himself been guilty of seducing her under and by means of the marriage promise, we can see no reason why she should not have an action against him. No authority cited covers such a case, and we think it would not be proper to take it from the jury.

The court also refused a request that an instruction should be given to the jury that certain circumstances sworn to by plaintiff tended to show that she had previously had connection with some other person than the defendant. The ground of the refusal was that no medical evidence had been introduced calling for such a charge.

If the court had assumed to charge upon a question of physiology, not explained by medical evidence, it could only have been on the ground that the jury and every one else had equal knowledge upon the subject. It was not a question of law in any sense, and an instruction upon it as a question of fact would have been usurping the province of the jury. There is nothing to show that counsel were not allowed to argue to the jury on this evidence, and it was to the jury, and not to the court, that such arguments should be addressed.

The charges requested on the theory that the promise to marry was in consideration of illicit intercourse, are not supported by any evidence, and we need not consider them. Defendant denied the entire case, both as to engagement and intercourse. The plaintiff's story showed a previous and existing engagement.

In regard to the charge requested as to a breach of the engagement, it was proved by defendant himself that he had married another woman, and so put it out of his power to marry plaintiff. This gave her an immediate right of action.—*Short v. Stone, 8 Q. B., 358; Frost v. Knight, L. R., 7 Exch., 111.*

Defendant also asked a charge that the jury had no right to be governed by, or act upon, their sympathies, in

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their deliberations in the case. The court told them, "You have no right to act upon your sympathies without any proof; but if the proof happened to concur with your sympathies, you are not to disregard the proof because of that fact; you are to be governed by the proof in the case." We can see no error in this.

A request was made that the jury be instructed to find specially on certain questions of fact. Some of these were given, and the jury answered them; others were refused, and very correctly, as not being proper questions in any sense of the term. But only one is brought before us for consideration, and that is, whether plaintiff ever had sexual intercourse with any other person than defendant, at any time prior to the marriage of defendant.

It is quite plain that no answer which the jury could have given to this question, whether affirmative or negative, could have affected the general verdict, so as to be inconsistent with it. This being so, it was immaterial, and was properly rejected. It could have been made pertinent by no other means than the addition of several important limitations and qualifications. We are, therefore, relieved from any consideration of the statute, which does not contemplate any questions not leading to legal conclusions.

A further question is presented, involving the right of the circuit judge to remark to the jury upon evidence. It is claimed that in this case the judge went beyond his authority. In connection with this an argument is made concerning the effect of certain statutes.

By section one of an act in regard to instructing juries, passed March 26th, 1869 (*Comp. L.*, § *5023*), it is provided that judges shall only charge upon the law of the case, and that the charge shall be written. By an act approved April 2d of the same year, provision was made for a stenographer for Wayne county, and it was declared that in cases where he acted, sections one and four of the former act should not apply.—*Comp. L.*, § *5034*. The title of the latter act is, "An act to provide for the appointment of a

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stenographer for the circuit court for the county of Wayne, and other counties in this state, and to limit the operation of sections one and four of an act," etc. It is objected that this law is unconstitutional in providing for more than one subject, and also that if valid, the effect is not to affect so much of section one of the former act as relates to charging upon the law.

We do not perceive any duplicity in the title. It indicates that in the view of the legislature the employment of stenographic reporting will render it unnecessary to make all the changes in the former practice, introduced by the law of March 26th, and there is no reason that we have discovered that would authorize us to infer that in their opinion the old system would not work well enough with full reporting of all that is said on the trial. The whole legislation relates to a single topic, and when the law declares that section one shall not apply, we have no warrant for construing it so that only a part shall not apply. If the former part of that section was (as it is claimed it was) designed to prevent judges from making as full reference to the facts as formerly, it may very well have been directly connected with the provision in regard to written charges, which would necessarily make it difficult in many cases to reduce to writing during a busy term, as long and elaborate a charge as might be given orally. We do not express any opinion concerning the true meaning of the first part of the section, nor whether it changes the existing law or not. There is no such repugnance, in our opinion, as to make it necessary or proper to construe the later act as applying only to a part of the section. We are therefore to consider the objections made to the charge, as governed by the common law.

Two witnesses had been called by defendant to prove an act of unlawful intercourse by plaintiff with one of them, which had been denied by plaintiff. One of them gave testimony tending to prove it, and the other swore to being

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at the place, and refused to speak further under the privilege against self-crimination.

Before the judge had begun to charge the jury, defendant's counsel, among other requests, included this: "The opinion or intimation of the court as to the weight that should be given to the testimony of witnesses is not binding on the jury, but the jurors should for themselves say what weight should be given to the testimony of each witness."

The judge, after some remarks upon the peculiar character of such a request, stated that as it had been made, he would put the case in such a position that it might become applicable. He then gave some further cautions in regard to the different things to be observed in weighing the testimony of witnesses, and after comments on some of the other testimony, referred directly to that of the two witnesses just mentioned, and concerning them, spoke as follows: "Now, gentlemen, those two witnesses, as you have seen them on the stand, it is a question for you to say whether you will put any credit whatever in their testimony. If I were in your places, I should discredit their testimony entirely, but with that I have nothing to do; I am not in your places, but I am charging you upon the law of the case." He had previously charged the jury that they were to pass upon the credibility of all the witnesses.

The division of functions between court and jury is one which is essential to the safe administration of justice, and a new trial will always be granted when the judge interferes with the lawful province of the jury. He has no right to take away from them the decision of any question of fact, and he cannot deprive them of the right to settle for themselves what witnesses or what testimony they will credit or discredit. This would be clearly error.

The question in this case is whether his course on the trial was within the prohibition. And it is by no means free from difficulty. The course in the English courts

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has always been less nice than in most American courts, in avoiding the discussion of facts and testimony in such a way as to indicate the opinion of the judge on questions involved. The freedom with which the circuit judge in this cause expressed his views on the two discredited witnesses is at least unusual, and he evidently understood this.

We have had our attention called to many authorities upon the general subject, but have found no case in which the course pursued here has been held so erroneous as to vitiate the proceedings. The practice in this state has grown out of the common-law practice in England, modified by various elements, chiefly introduced from New York and New England. The question we are considering has been discussed in the courts very frequently, and decided very uniformly.

The rule seems to be this: That an expression of opinion from the judge does not amount to a misdirection, even though it may be quite pointed, if the jury are fully informed and understand that they are not bound to follow it, and that they have the right and duty to decide for themselves. In *Taylor v. Ashton, 11 M. & W., 400;* and in *Darby v. Ousley, 1 H. & N., 1,* in the exchequer, the court expressed opinions which covered most of the merits, but told the jury it was for them to decide upon the questions. In the latter case there are some remarks on the duty of a judge to prevent a jury from being confounded by sophistry and artifice. In *Solarte v. Melville, 7 B. & C., 430,* Lord Tenterden tried the cause, and the verdict was sustained on the same ground, that the case had been fairly left to the jury. This case was in the Queen's bench. In *Davidson v. Stanley, 2 M. & G., 721,* the court of common pleas applied the same rule, asserting the right of the judge to express his views. Coltman, J., said: "The learned judge seems to have made strong observations, but not stronger than he was justified in making." These are illustrations of the rule followed by all the courts at West-

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minster, and the reports show such to be the constant practice.

In *Tracy v. Swartwout, 10 Peters, 80,* the subject is discussed, and the same rule followed. And in *Games v. Stiles, 14 Pet., 322,* the same question came up, and the court used this language: "The principle is well established that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion in regard to the facts. When a matter of law is given by the court to the jury, it should be considered as conclusive; but a mere matter of opinion as to the facts will only have such influence on the jury as they may think it entitled to."

In Massachusetts, the subject was discussed and the same rule asserted in *Commonwealth v. Child, 10 Pick., 252;* in Vermont, in *Gale v. Spooner, 11 Verm., 152,* and *Stevens v. Talcott, Id., 25;* in Connecticut, in *Swift v. Stevens, 8 Conn., 431.* Other New England cases were cited on the argument.

In New York there are several cases, referred to in the argument, and fully maintaining the principle. The case of *The People v. Rathbun, 21 Wend., 509,* which was tried at the circuit by Judge Dayton, a judge who was very cautious, was one where on the trial the remarks upon the evidence went very much further than those of the judge in the cause before us.

After a careful search, nothing has been found to shake the doctrine. No such expression has been held a fatal misdirection, where the jury have been cautioned as to their own province. But where there is reason to believe they have not been so cautioned, and have not understood their right, the verdict has been as generally set aside.

There is so much danger of overstepping the line that the practice is one which is dangerous and very open to abuse. But it is very difficult for a judge to aid a jury in arriving at a fair verdict, without indicating to some

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extent his impressions on facts and witnesses. Every day experience shows us that it is a very bad practice to attempt to lay down abstract legal rules. They are more apt to mislead than to guide any jury. It is only by showing how rules are to be applied in the case before them, that a jury can be wisely directed. They must be cautioned in regard to the quality of evidence, and the ear-marks of truth and falsehood; the facts must be grouped so as to be placed before them in order, and if any thing has occurred which is likely to mislead them, they must be put on their guard. It is almost impossible to perform the duties of a judge upon a jury trial without giving out many impressions, in spite of care to the contrary. Suggesting caution is a suggestion that there is something needing it. Advising scrutiny often shows and must show what witnesses need watching. Unless a court leaves some of its duties unperformed, it will often be possible for a jury to conjecture some of its views on facts as well as law. Our courts are usually very careful not to go too far, and their caution is commendable.

In the case before us, if the law had been more doubtful, it would be questionable, but it need not be decided, whether a party who practically invites an expression of opinion can complain of it. The judge gave the charge prayed for, and the request was framed in anticipation of a charge on the credit of the witnesses. As it stands on the record this request appears to have been uncalled for, but whether this were so or not, it distintly anticipated that the circuit judge might refer to the testimony, and asked a charge on that hypothesis, which was given distinctly and clearly.

But the language complained of in this record is a much less explicit showing of the judge's opinion than would have been made by his ordering witnesses under arrest for perjury,—a course open to him upon what he may find from the facts shown in a cause tried before him,

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and recognized both by common law and by statute.—*Comp. L.*, § *7657.*

It can not be said the record shows his distrust of these witnesses to have been entirely unfounded. Their story was contradicted under oath by the plaintiff, and was not, as reported in the bill of exceptions, of such a nature as to cause a conviction that the circuit judge acted without reason. It was improbable on its face, and we are not surprised at its effect on the verdict.

We find no error on the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

William H. Barnard and another v. Luman Jennison and another.

Mortgages: Deeds by way of security: Rents and profits: Agents. The grantees in possession under a deed absolute in form, but given by way of security merely, do not stand exactly in the same position, in reference to an accounting for the rents and profits, as ordinary mortgagees who have taken possession by way of enforcing their security; they are agents of the grantors as well as mortgagees, and are chargeable for any failure to obtain full rental value for the premises only on the same grounds as an agent thus put in possession.

Heard April 29 and 30. Decided May 6.

Appeal in Chancery from Kent Circuit.

This is a bill to redeem from a deed given by way of security, and for an accounting as to the amount due. The defendants had been in possession, receiving the rents, and various other dealings and transactions between the parties, claimed to have a bearing upon the accounting, were introduced in evidence. The decree established complain-

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ant's right to redeem, and found a balance due from defendants of eight thousand six hundred and fifty-one dollars and ninety-six cents. From this decree the defendants appealed.

J. W. Champlin and *G. V. N. Lothrop*, for complainants.

Miller & Rogers and *Hughes, O'Brien & Smiley*, for defendants.

COOLEY, J.

We are entirely satisfied with the conclusions of the circuit judge on the main questions involved in this case. The conveyance of the Barnard House property to the defendants, though by deed absolute in form, was unquestionably by way of security merely, and the complainants were entitled to redeem.

But the allowance to complainants for the rent of the premises while held by defendants appears to us on the evidence to be excessive. We do not think defendants were exactly in the position of ordinary mortgagees who take possession by way of enforcing their security; they were agents of complainants, as well as mortgagees, and for any failure to obtain full rental value for the premises, they are only fairly chargeable on the same grounds that an agent thus put in possession could be. They are charged by the decree with nine hundred dollars rent a year for the whole time they have had control, though it is shown the first tenant was to pay four hundred only, and the third five hundred; and nine hundred seems to us rather above, than below, what the evidence tends to show a fair rent to have been from year to year for the whole period, without taking into account any contingencies in loss of time in renting, or failure in collections, which, in case of such property as a second-class hotel, would be likely to be important. We have no idea from the evidence that defendants have received any such sum; and though in consequence of their failure

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to keep accounts and to make a full exhibit, all presumptions may reasonably be against them, yet if we charge them four hundred and fifty dollars for the first three years, and seven hundred and fifty afterwards, we think complainants will be well compensated for the use of their premises. Making a computation on this basis, the amount due complainants at the date of the commissioner's report would be five thousand two hundred and sixty-seven dollars and ninety-seven cents. The decree for payment by the defendants should be reduced to this sum, and in all other respects be affirmed. Neither party will recover costs on the appeal, and the case will be remitted for further directions, should they be needful.

The other Justices concurred.

The Trustees of the First Orthodox Congregational Church of Middleville v. Stephen Walrath.

Building contract: Forfeiture: Stipulated damages. Where a building contract contains many and various conditions, a breach of some of which would be easily and fully compensated by damages readily proven, and where a breach of others would not necessarily involve more than trifling damages, a provision for the forfeiture of five hundred dollars in case of any failure to perform on either side will not be enforced by way of liquidated damages, though such be the expressed intent.

Stipulated damages. Former cases on the subject of stipulated damages collected and followed.

Heard April 30. Decided May 6.

Error to Barry Circuit.

I. A. Holbrook and *Norris & Blair*, for plaintiffs in error.

Harvey Wright, for defendant in error.

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TRUSTEES FIRST ORTHODOX CONGREGATIONAL CHURCH, ETC. v. WALRATH.

CAMPBELL, J.

The only question presented for decision under the assignment of errors in this case, relied on by plaintiff in error, is, whether it was proper to allow a sum of five hundred dollars as stipulated damages for breaches of contract. The assignment of errors is within the principle of *Mandigo v. Mandigo, 26 Mich., 349*, and sufficient for this purpose.

The contract sued on was a building contract containing many mutual conditions and stipulations as to time and manner of doing various parts and items of work, as well as in regard to payments. It ended as follows: "And for due time and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves each unto the other in the penal sum of five hundred dollars, as fixed and settled damages to be paid by the failing party."

If some particular provisions of the contract had been selected, for the failure to perform which no damages could be computed with reasonable correctness and certainty, and stipulated damages had been fixed for the breach of such provisions, fair and reasonable in amount, perhaps they might have been sustained. But many of the conditions of the contract before us are capable of adequate and exact vindication in pecuniary damages, and most of them could be compensated with very little difficulty. For some breaches of the contract five hundred dollars would be very much below the certain damages in money required for compensation, while for others, as, for example, for delays and variations in performance, it might be an exorbitant allowance. It is impossible to infer that it was deliberately intended that all of these failures to comply with the agreement should be placed on the same footing, and if it had been so intended, the stipulation would be too unreasonable to be enforced.

As this subject has been before the court on several

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occasions, and has been discussed in the recorded opinions, it is not necessary to repeat the discussion.—See *Jaquith v. Hudson, 5 Mich. R., 123; Davis v. Freeman, 10 Mich. R., 188; Daily v. Litchfield, 10 Mich. R., 29; Richardson v. Woehler, 26 Mich., 90.*

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Myron Northrup v. Attilus D. McGill.

Contract construed: Partners: Sale: Security. A contract of sale by one partner to another of his share and interest in the store and business, together with the goods and all accounts and demands due the firm, which provided for the payment by the purchaser, of all debts of the firm, and of the purchase price, one-quarter down and the balance on time, secured by a lien on "said goods," etc., is construed to contemplate the holding of the entire goods, and not simply the proportion thereof so sold, as security for the performance of the terms of the purchase.

Partners: Shares: Presumption. Partners are presumed, in the absence of any showing of their respective interests, to be equal partners.

Trover: Mitigation. A defendant in trover can not show in mitigation of his unlawful taking of the plaintiff's property, his own unauthorized and unsanctioned application of the fruits of his tort, upon a naked personal demand of his own against the plaintiff, not in judgment, nor a lien upon the property converted.

Submitted on briefs April 30. Decided May 6.

Error to Sanilac Circuit.

Watson Beach, O'Brien J. Atkinson and *Trowbridge & Atkinson,* for plaintiff in error.

A. E. Chadwick, for defendant in error.

GRAVES, J.

On the 17th of June, 1869, the parties entered into the following written agreement:

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"This agreement, made this 17th day of June, A. D. 1869, between Attilus D. McGill, of the first part, and Myron Northrup, of the second part, both of Lexington, Sanilac county, Michigan, witnesseth: that for and in consideration of the sum of four hundred dollars, to him to be paid, the said Northrup hereby sells to McGill his share and interest in the drug store and business heretofore carried on by them, together with the stock of medicines, drugs, wines, liquors, toilet articles, perfumery, and the entire lot of goods now in their store in Lexington, and also all accounts and demands due the firm of A. D. McGill & Co., all to become the property of said A. D. McGill, provided said McGill shall pay to said Northrup four hundred dollars, as follows: One hundred dollars down; one hundred dollars three months from date; one hundred dollars nine months from date, and one hundred dollars fifteen months from date, with interest at ten per cent., according to the tenor of three promissory notes, bearing even date herewith, and also pay all debts contracted by the late firm of A. D. McGill & Co., and until the said sums are paid, as aforesaid, said Northrup shall have a lien on said goods, drugs and medicines, wines and liquors, in the nature of a chattel mortgage, and in default of said payments may take possession of the same, and take such further steps as may be necessary to secure the payment of such sums of money."

About the first of September, 1870, the store was destroyed by fire, and only a small part of the stock was saved, and this was taken by Northrup and appropriated. McGill sued him in trover and recovered one hundred and fifty-seven dollars. Exceptions were taken on the trial, and a part of them are now insisted on as sufficient to overturn the judgment.

The most material question in its bearing upon the judgment, relates to the construction of the written agreement. The circuit judge gave the case to the jury on the hypothesis that when Northrup sold to McGill they were equal partners in the concern, and that Northrup bargained only

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an undivided half of the stock, and acquired or reserved a lien merely on that interest.

There is no express evidence that the parties had been partners at all, or of the quantity of the interest which Northrup held or sold. The contract undoubtedly suggests the idea that the parties had been partners, and the trial seems to have proceeded on an assumption that they had carried on business in that way up to the time of the agreement. The circumstances may, therefore, be thought to close that question.

Supposing that they were partners, the law would, doubtless, in the absence of explanations or of facts leading to another inference, fully authorize the presumption that they were equal partners. It was proved, and not disputed, that Northrup had some interest when he made the agreement, and whatever it was, in kind or quantity, the agreement made it security, so far as it went, in the "goods, drugs, medicines, wines and liquors," for the payment of the sale price. Indeed it is not denied that his security extended to an undivided half. But I think the contract was intended to go further and to give him security on the whole interest in the "goods, drugs, medicines, wines and liquors" on hand at the time.

The parties had been carrying on a drug store and had a stock on hand. They held demands and accounts more or less, against their customers. They were indebted to some extent themselves. Northrup was selling to McGill not only his interest in the drugs and other things of that sort, but also in the demands due from customers. He would still be liable upon the debts of the concern. He was to receive but one hundred dollars in hand, and the only security contemplated beyond the personal responsibility of McGill, for the payment of the old debts and the purchase price, consisted of goods, drugs, medicines, wines and liquors then in the store.

The parties contemplated that the business would go on and that the stock to be covered as security would be

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diminished daily. It was competent for the parties to involve the whole interest as security, and it was certainly, under the circumstances, not only natural and reasonable, but consistent with common prudence to do so. It would have been strange if Northrup had not desired, or if McGill had declined, to arrange the matter upon a basis to give the former something more substantial and ample by way of security, for the payment of the old debts and the balance of the purchase price for the demands and accounts and other property, than a bare undivided half of some of the tangible property.

The circumstances then would strongly incline us to expect and look for something more, and when the agreement is appealed to, we think it manifest that the parties agreed upon something more. The lien or claim by way of security is not there confined to a partial interest, but is expressly put upon "said goods, drugs and medicines, wines and liquors." If an undivided interest had been aimed at, it is fair and reasonable to assume that the parties would have expressed themselves so as clearly to indicate that purpose; and when we observe that in the granting part of the instrument Northrup is expressly made to sell only "*his share and interest*," the assumption finds evidence in its support in the very terms of the writing. When the parties meant a partial interest, they had it in their minds to say so expressly. These considerations lead to a result opposed to the ruling of the circuit judge on this branch of the case.

It appeared in evidence that Northrup had sold the goods taken by him, at public auction, and after deducting five dollars for expenses, had applied the balance on one of the notes given by McGill and secured by the mortgage, and that subsequently he had recovered judgment on such note, and had allowed the sum so applied as payment. There was also evidence that among the articles he took and sold were some not covered by the mortgage. He thereupon contended that as all the property taken, and as

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well that not embraced by the mortgage as that which it covered, or rather a portion of its value, had gone to pay McGill's debt to him, the damages claimed against him for the conversion were required to be reduced correspondingly.

The circuit judge acceded to this view as to all the property covered by the mortgage, but rejected it as to any other, and as the defendant in error still contends that such application as to any portion of the property not covered by the mortgage, was admissible in defense by way of mitigation, and the question may arise upon another trial, it is proper to notice it.

It is admitted that in ordinary cases the full value at the time of conversion of the property converted, together with interest on that value, affords a correct measure of damages in trover. But it is also said very truly that this rule yields when the facts require it, to the principle on which the rule itself rests, namely: that the recovery in trover ought to be commensurate and only commensurate with the injury, whether that injury be less or greater in extent than the full value of the property and interest, and it is argued that this principle of justice regularly led to the admission of evidence on behalf of Northrup that on his own motion and without the assent or sanction of McGill, he applied on the McGill note which he held, sixty-eight dollars of the seventy-three dollars which he got for the goods.

While the law is settled that in trover a defendant may show in mitigation of damages that the goods have been voluntarily restored and accepted, or have been recovered by the plaintiff at an expense to him of less than the value, the cases are not in harmony upon the point that the defendant is entitled to show his subsequent application of the things converted, or their avails, upon a demand which the law has liquidated against the plaintiff.

The cases cited by the plaintiff in error countenance the defense. But several New York cases, and the late English

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case of *Edmondson v. Nuttall, 17 Com. B., N. S., 280,* are opposed to it. Still there is less real diversity, when the facts of the respective cases are looked into, than the opinions given would indicate, and examination proves that the courts which reject the view adopted in New York and England and extend the greatest indulgence to defenses of this kind, have not gone so far as to decide that one who seizes the property of another without color of authority is entitled to show in mitigation or exoneration, his own unauthorized and unsanctioned application of the fruits of his tort, upon a demand held against the plaintiff by himself, and which at the time of application is a naked personal claim or demand not attaching by way of lien or security to the property, and wholly unliquidated by any legally regulated proceeding. It is best, perhaps, to notice the cases cited on this subject.

In *Pierce v. Benjamin, 14 Pick., 356,* the defendant, being collector of taxes, seized and sold the property upon a lawful tax against the plaintiff. The *sale* was illegal, but the tax was valid and as veritable in law as a judgment. The collector had applied the proceeds of the sale upon this tax, and the court held that in the suit against him by the person who was bound to pay the tax, he might prove the fact in mitigation.

Doolittle & Chamberlain v. McCullough, 7 Ohio St., 299, was a very exceptional case upon the facts, and it can not be safely cited as authority upon the point in question. In *Baldwin v. Porter, 12 Conn., 473,* the defendant claimed that the plaintiff had regained his property through the agency of another party and at an expense much less than the value of the converted chattels, and was not permitted to give evidence to prove it, and the court on error held that the exclusion of the evidence was wrong.

In *Curtis v. Ward, 20 Conn., 204,* the defendant caused the plaintiff's goods to be attached. Whilst the goods were held in custody under the seizure so made, the levy was erased and the writ discontinued, and a new writ was taken

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and levied on the goods. Judgment was then obtained in the suit commenced by the second writ, and execution being issued upon it, the goods were taken and sold and the proceeds applied on the judgment. Curtis, the defendant in attachment, then sued Ward, the attaching creditor, for converting the goods, and counted on the seizure made under the first attachment. The court allowed Ward to show the facts and the application of the goods or their proceeds on the judgment, in mitigation of damages.

From this summary it plainly appears that the cases cited lend no support to the claim that it was competent for Northrup, if guilty of conversion, to show in mitigation of damages that without any direction or sanction on the part of McGill he had applied the converted property, or a portion of it, on the paper he held against McGill, and no case is recollected which goes far enough to sustain such a position.

In general, when there is no fraud, and when the law does not forbid, a man may dispose of his own property according to his own ideas of propriety. If he is indebted by note to different parties, he may apply his property to the payment of one, and refuse to apply it to the payment of another, and he may lawfully discriminate in this way, though in doing so he ignores the stronger moral claim resting upon him. This results from the supreme dominion which is involved in the absolute ownership of property. No creditor, without process, and without authority or right, except such as belongs to him as creditor, can dispossess his debtor of his goods and then mitigate or defeat a recovery by showing that the property taken has, without any assent or concession of the debtor, been applied on the debt.

Such intervention must have the sanction of the debtor or the law. The opposite view would lead to gross oppression and unlimited abuses. The creditor would be enabled to take the law into his own hands, and to unite in himself the power to judge and execute in his own favor and

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according to his own pleasure. We are therefore of opinion that on this part of the case there was no error.

The other points alluded to on the argument are unimportant, and will not be likely to arise again. The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

John G. Carter v. Eliza S. Lewis.

Mortgages: Foreclosure: Redemption: Subsequent mortgagee. A subsequent mortgagee may redeem a prior mortgage which has been foreclosed by advertisement under the statute.

Mortgages: Redemption: Register of deeds. While the register of deeds has no authority under the statute to receive any thing but money in redemption of a foreclosed mortgage, yet when one desiring to redeem goes to the register prepared to pay the money, and offers to pay it, and the register, knowing the amount, but being too busy to count the money, requests him to place the money in a bank and give a check for the amount, and he does so, and the register, after the expiration of the time for redemption, receives for the check a certificate of deposit in his own name for the amount, it can not be said that this is not such a payment of the money to the register as operates under the statute to redeem the mortgage.

Heard May 1. Decided May 6.

Appeal in Chancery from Jackson Circuit.

Gibson & Wolcott, for complainant.

Melville McGee, for defendant.

GRAVES, J.

The complainant filed this bill to settle his right as a subsequent mortgagee, to redeem a prior mortgage which had been foreclosed at law, and to obtain an adjudication upon the effect of measures taken to produce such redemp-

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tion. The sale under the foreclosure at law of the prior mortgage was made on the first day of November, 1870, and the time given by the statute for redemption in such cases is one year from the sale. Before the expiration of the year, and on the 30th day of October, 1871, the complainant called on the register of deeds at his office, for the purpose of making redemption pursuant to the statute, and the circumstances which then occurred are claimed by him to have worked such redemption. The defendant maintains that complainant was in no situation to redeem, but if he was, that the course taken was ineffectual. The court below decreed that complainant was entitled to redeem, and, moreover, that the acts done amounted to a redemption. From that decree the defendant has appealed, and she makes two objections.

The first, which was faintly pressed on the hearing, is supposed to be supported by the terms of § *6922, Comp. L.*, where provision is made for redemption in cases of foreclosure under the power of sale. It is said that in this state, and at the present time, a mortgagee can hardly be considered as holding "under" the mortgagor so as to come within the description of the class allowed to redeem within the year from the sale made under the power.

While we do not admit that this statute, which was made to regulate the exercise of the power of sale, would preclude a subsequent mortgagee from redeeming, even if the terms were such as to confine the right to those holding "under" the mortgagor, we find that another passage in the law, which seems to have been overlooked, is so plain and ample as to take away all pretense for the objection. The right to redeem is not only given to "any person lawfully claiming under," but likewise to "any person lawfully claiming *from*" the mortgagor, and certainly there is no possible room for saying that the mortgagee does not *claim from* the mortgagor.

In support of the second objection it is urged that the register of deeds is allowed to receive nothing but money

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for redemption where the proceeding, as was the case here, is left where the statute leaves it; but that the register in this instance received the private check of complainant, and not money. We do not question the proposition, that the register has no authority from the statute to receive any thing besides money, and the circumstances require no opinion as to what would be the effect upon the mortgage and foreclosure proceedings caused by his cancelling the foreclosure deed and noting the mortgage record as satisfied, when he had received something besides money in redemption. According to the admitted facts, when fairly considered, the complainant did pay the amount in money to the register. It was not essential that there should be a transit of the money from the hand of the complainant to the hand of the register; nor was it indispensable that the sum should in dollars and cents be counted out in lawful money at the moment, and left in the room where the register had his office, or placed about his person. The form and shell of the transaction could be of no moment. The law requires payment to the register, and if the proceeding is marked by good faith, and a payment is understood, and the money is actually lodged at some convenient and proper place, in exact accordance with the wish and direction of the register, it is a payment to the register.

The question in the present case is not whether, by the mode adopted, there was a chance that payment might not be accomplished, but it is whether in point of fact it was accomplished within the time. Now, the real import of what took place cannot be mistaken. The complainant was prepared to pay the money and desired to pay it. He was not seeking to pass off his check as payment. He offered the register lawful money and desired him to accept it. The latter being too busy to count it, but knowing the amount which was needed, for his own personal convenience, and merely to save the necessity of counting, hit upon the expedient of taking a check for the amount, and procured the complainant to leave the money in bank

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where the check would apply to it. The check, as a substitute for the counting, was given as requested, and the money remained in the bank subject to the register's call, and in the course of three or four days the latter called with the check and found the money ready. It had been there all the time. Instead of drawing the cash the register then took a certificate of deposit, which he preferred to hold in lieu of money.

Now, when in good faith and in precise accordance with the express direction of the register, and who does not appear to have questioned the transaction as a payment, the complainant gave his check and provided and kept the money at the bank in completion and execution of the scheme of payment, the money was paid "*to the register*" and was in his hands for those entitled to it as redemption money.

The decree below should be affirmed, with costs.

The other Justices concurred.

Albert R. Foster v. Mathew Wiley and another.

Attorney and client: Liability: Trespass: Execution: Implied authority. A client who puts his case against another into the hands of an attorney for suit is presumed to authorize and sanction such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand; and whatever adverse proceedings the attorney may take are to be considered, so far as they affect the defendant in the suit, as approved in advance by the client, and therefore as his act, even though they prove to be unwarranted by the law; as to trespasses upon third parties the rule is different.

A client is held liable in this case in trespass for the taking of plaintiff's property upon an execution issued by a justice of the peace at the instance of the attorney, after an appeal had been perfected.

The limits to the implied authority of an attorney in ordinary cases of suits brought to enforce money demands pointed out and authorities cited.

Statute construed: Sheriffs: Constables: Process. Under our statute (*Comp. L. 1871, § 568*), expressly empowering sheriffs to serve any process which consta-

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bles may execute, no special direction for the purpose is necessary; and a deputy sheriff is not liable in trespass on the ground of want of authority to act, for levying a justice's execution addressed to any constable, etc.

Officer: Execution: Appeal: Notice. An officer does not render himself liable in trespass for proceeding in good faith to serve a justice's execution after he has been told by the defendant that an appeal has been taken, where the justice insisted that the appeal had not been perfected; he has a right to rely upon his process until he is officially notified of its having been superseded.

Heard May 1. Decided May 6.

Error to Allegan Circuit.

Hawes & Edson, for plaintiff in error.

Severens, Potter & Boudeman, for defendants in error.

COOLEY, J.

Foster sued Wiley and Montieth in trespass for taking from his possession a certain carriage. The defendants justified under an execution issued on a judgment against Foster in favor of Wiley, by virtue of which a levy was made on the carriage by Montieth, as deputy sheriff. The judgment was rendered by a justice of the peace, and it was not disputed that that, as well as the execution issued upon it, was in due form of law. Foster claimed, however, that he had appealed the judgment to the circuit court before execution was issued, and consequently that there was no authority for issuing the same. He also claimed that if the execution had been lawfully issued, Montieth would have had no authority to execute it, because it was directed to any constable of the county, and not to the sheriff.

The facts regarding the appeal appear to have been, that the proper papers for the same were prepared and served upon the justice, and all costs paid, except the fee of one dollar for making return. The justice treating the appeal as ineffectual because of the non-payment of this fee, refused to make return, and issued execution when he was requested to do so. The circuit court afterwards, on appli-

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cation of Foster, ordered the justice to make return, but not until after the carriage had been taken and sold on execution.

The record requires us to assume for the purposes of this case that the appeal was properly taken and perfected, and that the issue of the execution was unwarranted; and upon this basis we are to discuss the responsibility of these defendants. Wiley is supposed to be responsible, either because, as plaintiff in the execution, he may be presumed to have directed its issue, or because the evidence tends to show that he had knowledge of its being taken out, and of the subsequent proceedings, and having interposed no objection, must be assumed to have approved and adopted them. The grounds upon which Montieth is thought to be liable are different, as we shall see hereafter.

It is not claimed that Wiley personally directed the issue of execution, but it is conceded that it was ordered out by one Stoughton, an attorney, into whose hands for collection Wiley had placed the demand upon which judgment had been recovered. And one question would seem to be whether, where one places a demand in the hands of an attorney for collection, he is to be held as approving and adopting whatever is done by the attorney in respect to the demand for the ostensible purpose of collecting it, not only until judgment is obtained, but afterwards.

It is sometimes said that the authority of an attorney ceases with recovery of judgment; but this is not so for all purposes. He is in general presumed to have authority to cause execution to be issued, and to receive the money in payment thereon;—*Langdon v. Potter, 13 Mass., 320; Commissioners v. Rose, 1 Desaus., 469; Gray v. Wass, 1 Greenl., 257; Brackett v. Norton, 4 Conn., 517; Silvis v. Ely, 3 W. & S., 420;* but he cannot bind the plaintiff by accepting less than the full amount;—*Vail v. Jackson, 15 Vt., 314; Jackson v. Bartlett, 8 Johns., 362; Brackett v. Norton, 4 Conn., 517; Nolan v. Jackson, 16 Ill., 272; Lewis v. Gamage, 1 Pick., 347;* or by bidding in property

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in the name of the plaintiff at a sale under the execution;—*Beardsley v. Root, 11 Johns., 464; Huston v. Mitchell, 14 S. & R., 307;* or by a discharge of the defendant from arrest upon the execution without satisfaction;—*Kellogg v. Gilbert, 10 Johns., 220; Simonton v. Barrell, 21 Wend., 362;* see *Keller v. Scott, 2 S. & M., 81;* and the weight of authority seems to be against the right of the attorney to compromise the demand without special instructions;—*Lewis v. Gamage, 1 Pick., 347; Holker v. Parker, 7 Cranch, 436; Penniman v. Patchin, 5 Vt., 352; Carter v. Talcott, 10 Vt., 471; Simonton v. Barrell, 21 Wend., 362.* These cases sufficiently indicate the limits to the implied authority of an attorney in ordinary cases where suit is brought to enforce money demands.

The question in the present case, however, is different from that which might arise in a case where by law an execution might lawfully be issued. Assuming that the suit had been appealed, it is insisted that, whatever implication there may be in other cases, of authority in the attorney to order out an execution, there could be none in a case where by law no execution could issue, and where, consequently, it could not be assumed that the plaintiff himself would order one. The act of the attorney in such a case being a naked tort, it is insisted that no presumption of his client's agency can be indulged in, and he alone must be held responsible for the trespass which followed, unless affirmative evidence is given that the client was consenting to his action.

The cases relied upon in support of this position are not very directly in point. They may be said to settle the principle that a party on whose behalf an execution is issued is not liable for irregular action of the officer under it, or for a trespass committed by the officer upon the property of a third person, unless it is made to appear that such irregular action or such trespass was directed or assented to by him.—*Freeman v. Rasher, 13 Q. B., 780; Averill v. Williams, 1 Denio, 501; Same v. Same, 4 Denio,*

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295; Ferguson v. Terry, 1 B. Monr., 96; West v. Shockley, 4 Harr., 287. This is on the principle that in suing out an execution he must be assumed to have intended a lawful exercise of authority by the officer, and not unlawful action.

On the other hand, in *Barker v. Braham and Norwood, 3 Wils., 368*, where an attorney had taken out a *ca. sa.* against an administratrix without any suggestion that she had been guilty of a *devastavit*, and consequently without authority of law, both attorney and client were held liable for the trespass, and no question was made of the client's responsibility, though there is no suggestion in the report that he personally participated in the proceedings, and the contrary is inferable. In *Bates v. Pilling, 6 B. & C., 38*, attorney and client were held jointly liable in trespass for the issue and service of an execution by the attorney's agent after the demand had been paid, though neither of them directed or knew of its issue. In *Crook v. Wright, R. & M., 278*, it was held by Abbott, Ch. J., that where a trespass "was committed in the service upon the defendant therein of an execution sued out by an attorney, it is necessary in order to make the plaintiffs in the execution liable, that it be shown the attorney was retained in the cause; but when that was shown, the plaintiffs were made trespassers by the act of their attorney." The case is not very fully reported, and it does not distinctly appear on what ground the action under the execution was held illegal; but the inference is that it was because irregularly issued; and the responsibility of the plaintiffs for their attorney's action is clearly affirmed. All these cases are referred to by Cowen, J., in *Newberry v. Lee, 3 Hill, 525*, where it was decided that proving a levy on an execution sued out by the defendant's attorney, and purporting to be issued on a judgment in the defendant's favor, sufficiently connects the defendant with it; and if the attorney is liable to the defendant in execution in trespass, the client is liable also.

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There is a plain difference between a trespass committed on a third party in assumed execution of process, and one committed on the defendant under process sued out irregularly. A plaintiff can never be held to intend a trespass to third persons; but when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand, and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law. Such seems to be the result of the authorities. It follows that the circuit court erred in holding Wiley not liable.

The case of the officer is next to be considered. It is claimed, *first*, that he is liable because the process was not addressed to him, and therefore he had no authority to serve it. But the statute expressly empowers sheriffs to serve the process which constables may execute;—*Comp. L. 1871*, § *568;* and it does not require that there should be any special direction for the purpose; *second*, it is claimed that he is liable because he was notified the case had been appealed, and if he proceeded afterwards it was at his peril. The notification consisted in his being told by the defendant in the execution that an appeal had been taken. Upon this it may be observed that the justice whose duty it was to refrain from issuing an execution where an appeal had been perfected, denied the fact, and whether he or the defendant in the execution was in the right, was a question which depended upon facts that the officer had no facilities and no authority for trying and determining. If the officer having the execution could in any such case be compelled to inquire into and draw the correct legal conclusions from the facts

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which are alleged to invalidate his process, he would not only be constantly and very unjustly exposed to peril for the acts and defaults of others, but unscrupulous persons would not fail to find many ingenious methods of suggesting doubts and difficulties to careful officers, which would result in staying indefinitely in some cases the execution of legal process. The law does not require the officer to take notice of such suggestions. He has a right to rely upon his process until he is officially notified of its having been superseded. No error was therefore committed in holding the officer not liable.

Something was said on the argument about the carriage having been exempt from execution; but by the record nothing is made to turn upon that.

The judgment must be affirmed, with costs, as to Montieth, and reversed, with costs, and a new trial ordered, as to Wiley.

The other Justices concurred.

Henry G. Ellsworth and others v. The City of Grand Rapids and Francis Cain.

Highways: User: Statute construed: Dedication. Under the statute (*Comp. L. 1857, § 1079*) providing that "all roads not recorded, which have been used as public highways twenty years, or more, and all roads not recorded, which shall hereafter be used ten years or more, shall be deemed public highways," etc., the question of dedication is not involved; the right of the owner to dispute the public user is barred, so far as the prospective provisions of the statute are concerned, after the prescribed period of uninterrupted and undisturbed user, whatever the actual intention of the owner may have been.

Highways: User: Platting lands. The mere making and recording of a plat upon paper by the owner of the land, ignoring the existence of a road in actual use, is not such an interference with the public user of such road as to affect the limitation prescribed by the statute.

Highways: User: Assessing taxes. The fact that the public taxing officers have assessed taxes upon lots according to a plat so covering a road in actual use as that the lots lie partly within and partly without the space covered by the

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road, does not estop the public or cut off their right to the use of the road; and especially not where such taxes do not appear to have been assessed prior to the expiration of the statute period making the public right absolute.

Heard May 1. Decided May 6.

Appeal in Chancery from Kent Circuit.

Thomas B. Church, M. J. Smiley and *D. Darwin Hughes,* for complainants.

J. W. Ransom and *L. D. Norris,* for defendants.

CHRISTIANCY, CH. J.

The complainants are severally the owners in fee of several lots on the plat known as "Ellsworth's addition to the city of Grand Rapids," and filed their bill against the city and defendant Cain, as a contractor under the city, for a perpetual injunction to restrain them from grading and graveling a road or street, claimed by the city as a public highway, under the name of the "Grandville road," across the lots of complainants, and from constructing therein gutters, cesspools, bridges and culverts; complainants denying the existence of the highway over their lots, as claimed, and about to be graded and graveled by the city.

It is unnecessary to notice the pleadings further than to say that the bill alleges the platting of the land including the lots in question, by one Ellsworth, through whom complainants derive title, in the year 1857; that the city authorities have assessed taxes upon these lots as thus platted, for various city improvements, declaring them within certain taxing districts for this purpose, and thereby recognizing the plat; and complainants annex a plat of part of said "Ellsworth addition," showing the lots in question and the other adjoining lots with the projected streets laid down thereon, by which it appears that said plat was drawn without any reference to, or recognition of, said "Grandville road," which, if extended through said plat from Wealthy avenue on the south to Summit street (the only

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portion coming in question in this case), as claimed, and about to be graded by the city, would cut diagonally through the lots in question, taking nearly all of some of the lots, cutting several of them into two pieces, and leaving most of them in a bad shape.

A road known as the "Grandville road," extending from the foot of Greenwich street, in the city of Grand Rapids, to Grandville, a distance of some six miles, is impliedly admitted by the bill to have been recorded as laid out many years before, which, if opened, would also extend diagonally through this plat; though it is claimed it was never opened and worked, and that it has been abandoned; and it is alleged that this recorded road, if extended and opened through this plat, would run across this plat more than its entire width west of this road as claimed by the city. And, while the bill alleges that the city claims there is a legal public road by user for more than twenty years, without objection from the owners of these lands where they are proceeding to grade across this plat, it denies the existence of any such highway by user, and alleges that the road, as thus claimed by user, has been abandoned by the city, so far as it would extend across this plat, and still farther into the city.

The answer, admitting the title of the complainants and the laying out of the plat by Ellsworth, alleges that at the time of the making and recording of the plat, so much of the said lots as is covered by the Grandville road (as claimed and about to be graded by the city) was under the control and protection of the city, as a highway, known as the "Grandville road;" and that the same was then open and used as a highway by the public, and had been in the open and notorious possession of the public as a highway for more than twenty consecutive years prior to that time; and that Ellsworth (who laid out the plat) extended it over and upon said highway, in his own wrong and without lawful authority; that at the time of the incorporation of the city (which was in 1850) the said road had been an

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open and public highway known as the "Grandville road;" and that by the incorporation of the city, the care and supervision of said highway was committed to the city, so far as the same is within the city limits; and that the city has the power, and it is its duty, to protect and improve the same; admits that the officers of the city, before the filing of the bill, had assessed taxes on some of said lots across which said highway, as claimed by the city, runs, for the grading of Summit street; and that all said lots have been from time to time assessed by the supervisor of the first ward of the city for state, county and city taxes; but denies that this was done by the authority of the city, upon so much of said lots as lie within the boundaries of said road, and alleges that the officers making such assessments were misled by said plat and the wrongful act of Ellsworth in extending it over said road, without marking the road upon the plat.

The answer claims this as a highway, both by reason of its having been laid out by the township authorities in 1834, and recorded as such, prior to the incorporation of the city, and by uninterrupted user as such by the public; admits that the city is about to proceed to grade and gravel this road across these lots, and claims that it is the right and duty of the city to do so.

From the evidence it appears that in April, 1834, a record was made by the commissioners of highways of the township of Kent (then including what has since become the city), of a highway laid out by them, from the foot of Greenwich street (in the present city of Grand Rapids) to Grandville, a distance of six miles, forty-eight chains and twenty-eight links, what purports to be a survey thereof being incorporated in the record. But we are entirely satisfied, from the evidence, that this road, if run according to the courses and distances given in the record, would not, where it crosses the plat in question, coincide with the lines of the road as claimed by the city, or as it was at any time

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opened and traveled; but that it would cross this plat more than its whole width west of the road as claimed by the city. But we are equally well satisfied that there was a mistake in the survey or in the recording it, and that the road, as it was actually laid out upon the ground at the time, corresponded substantially with the road as claimed by the city, and as subsequently opened, worked and traveled by the public.

The road, from the time it was thus laid out, down to the time of the commencement of this suit, has been one of the most important and most traveled roads leading into the city. The opening and working of the road by the public authorities commenced almost immediately after it was laid out, and it has continued to be worked by the public ever since, and to be traveled as a highway on the line where the city now claims it to be; with this exception, that there was a hill near its junction with Summit street, and on a part of the ground now covered by the plat in question, where, for the distance of about twenty rods, the travel previous to 1845 or 1846 usually turned out some six or eight rods to the east to get around the hill, and then came back into the line of the road again. But in 1845 or 1846 the road was opened and graded straight through or over the hill, and the side way around the hill closed up; and ever since that time the travel has been where the road was, in fact, laid out upon the ground, and where the city now claims it to be. And from that time (and, in fact, from the time the road was first laid out) down to about the time of the commencement of this suit, neither the existence of the road as a legal highway across this land, nor the right of the public to travel and use it as such across this land, seems ever to have been disputed by the complainants or those through whom they claim, or by any one else. And, as it was in constant public use, and that use must have been known to the owners, and they made no objection to it, and raised no

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question of the legality of the road, they must be taken to have acquiesced in such public user, and to have admitted the right of the public so to use it.

By *section 29, of chapter 25, of the Revised Statutes of 1846, (Comp. L. 1857, § 1079)*, which took effect March, 1847, it is enacted that, "All public highways now in use, heretofore laid out and allowed by any law of this state, or of the late territory of Michigan, of which a record shall have been made in the office of the clerk of the county or township; and all roads not recorded, which have been used as public highways twenty years, or more, and all roads not recorded, which shall hereafter be used ten years or more, shall be deemed public highways, but may be altered," etc. And by the act of March 15th, 1861 (*Comp. L. 1871, § 1268*), the same provision is continued, with the single exception that ten years is inserted in the place of "twenty."

Now, unless the mere making and recording of a plat of this ground upon paper can be regarded as taking the case out of the statute from the time of such plat, it is quite immaterial whether the ten-year limitation, commencing with March, 1847, had elapsed when the platting took place; since it is clear that the same undisturbed public user continued from 1845 or 1846 down to about the time of the commencement of this suit, in 1870; and this user had continued ten years under the prospective provisions of the statute in March, 1857, and double that period in 1865 or 1866.

But it is urged by the counsel for complainants, that the question of a highway by user, under this statute, involves and includes the question of dedication; and that the way by user, therefore, cannot be established without proof of the intent of the owner to dedicate the land to such public use as a highway; that any thing occurring within the prescribed period, showing that the owner did not, in fact, so intend, will disprove the dedication; and that, in this view, the platting of the ground over which the road actu-

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ally passed, by the owner, without recognizing or marking the road upon the plat, disproves the intention to dedicate, and thereby defeats the establishment of the road by user; though such user has been constant and undisturbed for the full statute period. But this view would reduce the question to one of dedication merely, in which no particular period of user is necessary, but which is to be decided by the intent of the owner to dedicate, and the acceptance of the dedication by the public. No statute was needed for such a purpose connected with roads of this kind, since it would have been competent to show the intention to dedicate, though the user had continued for a much shorter period; and to require under this statute proof of an intention to dedicate, as a necessary element to establish a road by user, would be not only to import into the statute an element of which no intimation is found there, but completely to nullify the statute itself, and to defeat its manifest purpose, which was, so far as its prospective provisions are concerned, to bar the right of the owner to dispute the rightfulness of the public user after the prescribed period, in all cases where the user for that period had been uninterrupted and undisturbed, whatever the actual intention of the owner might be.

The statute, in all such cases, is a fair notice to the owner that if he means to dispute the rightfulness of the public user, he must assert his right within the prescribed period in some way calculated to interfere with, disturb or interrupt such use by the public, or by the institution of a suit for the judicial determination of the right. The mere making and recording of a plat upon paper, ignoring the existence of the road, was not an act in any way calculated to interfere with, or disturb, the use of the way by the public. It offered no obstacle to travel, and neither persons traveling the road, nor the public authorities having charge of it, were bound to notice it.

Nor do we think the fact that the taxing officers of the city have assessed taxes upon the lots according to the plat,

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though such lots would lie partly within the space covered by this road, can be held to estop the public, or cut off their right to the use of the road; especially as it does not appear that any such taxes were assessed prior to the expiration of the statute period when the right of the public became absolute and that of the complainants was extinguished, whatever the effect of such taxation might have been, had it occurred prior to that period. But we do not mean to intimate that the effect would have been different in the latter case.

The decree of the circuit court granting a perpetual injunction must be reversed, and the bill dismissed, with costs of both courts to the defendants.

The other Justices concurred.

Hilton Wilson and others v. Lorenzo Eggleston.

Fraud: Misrepresentations: Buying up encumbrances. One who, while holding out inducements to another, whose estate is largely encumbered, that he will furnish means for him to redeem, and thereby prevents him from looking elsewhere, in the meantime purchases such encumbrances himself and cuts off the redemption, is guilty of fraud, and will not be allowed to enforce his advantage.—*Laing v. McKee, 13 Mich., 124*, followed and approved.

Equity pleading and practice: Remedy: Specific performance. A bill will not lie in such case to enforce specifically the giving of a loan as proposed, where there was no complete agreement. The remedy is by way of redemption.

Bill in equity: Specific performance: Dismissal: Decree modified. A bill should contain allegations of facts and not mere recitals of circumstantial evidence, and should show the theory on which complainant intends to rely. But where a bill making out a strong case of fraud was dismissed as improperly framed for specific performance, the decree below was so modified as to make such dismissal without prejudice.

Heard May 1 and 2. Decided May 6.

Appeal in Chancery from Kalamazoo circuit.

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William Fletcher, for complainants.

Robert F. Hill and *Arthur Brown*, for defendant.

CAMPBELL, J.

Complainants filed their bill against defendant to establish certain equities in regard to titles and encumbrances held by him against their real estate.

The circumstances out of which the controversy arose were these: In October, 1872, complainants, having been unfortunate in business, and their property, alleged to be worth fifteen thousand dollars, having been encumbered by several mortgages and execution levies and sales, amounting in all to something more than seven thousand dollars, desired to obtain a single loan on long time to take up all these claims, so as to enable them to resume business in their machine-shop. The redemption on one execution sale would expire as against them on the 26th of December, 1872. There was also a mortgage in process of foreclosure, on which a chancery sale was afterwards had in January, 1873, and other redemptions would run out at later periods.

Early in October application was made to Theodore P. Sheldon, of Kalamazoo, to aid them in obtaining the desired loan, and after some other suggestions, the bill shows that on the 14th day of October he informed complainants that he thought defendant Eggleston would lend them the money, to an amount sufficient to take up all the claims. Sheldon promised to see Eggleston, and inform complainants (or their agent, Mr. Fletcher), what could be done. Meanwhile he impressed it on Mr. Fletcher to keep quiet about the loan, and say nothing to any body about it, as Mr. Eggleston did not wish it known. Fletcher had several interviews with Sheldon, running along about two months, Sheldon constantly urging secrecy, as Mr. Eggleston did not wish it known, but saying he had not yet made up his

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mind. In one of these interviews, in the last part of November, Eggleston came into Sheldon's bank while Fletcher was there, and Fletcher requested Sheldon to speak with him about the loan. Sheldon spoke with him apart, and came back and reported that Eggleston had not yet determined to make the loan, but to keep quiet and say nothing about it, as Eggleston did not wish it to become known.

On the 23d of December, 1872, complainants learned that Eggleston had been buying up the liens and claims on the land. On the 28th, one of them (Jonathan Wilson) saw him, and he told Wilson he had purchased various claims, including the one on which the redemption expired on the 26th, and had got them at a discount of eight hundred dollars. The bill sets forth that several of the purchases were made at a discount, and that they were so obtained by inducing a belief that they were being taken up for complainants' benefit. Eggleston is charged to have denied having had any thing to do with Sheldon's representations, or having authorized them.

The bill charges that Eggleston knew that Sheldon was, by his representations of making a loan for Eggleston to complainants, misleading them so that they would not look elsewhere for the money, until after Eggleston had purchased said encumbrances and liens, and a loan from other sources would be unavailing to them; and also that Eggleston countenanced and encouraged Sheldon so to mislead them. It also charges that complainants have been assured by men of means that they would have lent them the money on the proposed security.

The bill further shows proceedings under the various sales, to obtain the property and oust them.

The demurrer is a general demurrer for want of equity; and if there is any thing whatever in the bill which could authorize any equitable relief, the demurrer cannot be sustained. It becomes necessary, therefore, not only to con-

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sider its sufficiency as to the special relief prayed, but in other respects.

Its primary purpose is to obtain specific performance of a contract to make the time loan. But this cannot be maintained. There never was any agreement, and, even if one were claimed by way of estoppel, there would be too much uncertainty as to its terms. Moreover, it would involve a question of some importance under the statute of frauds, there having been no performance. The case in this, as well as in some other aspects, has some resemblance to *Taylor v. Boardman, 24 Mich., 287.*

No equity could arise which any court could enforce merely out of Eggleston's purchases at a discount. It is not averred that the securities were sold on any agreement or representation that complainants were to have the benefit of the reduction, and, while the creditors would probably have been more liberal with them than with strangers, yet, unless some stipulation or condition to that effect was expressed or implied in the sales, no trust could arise out of them.

The bill, however, contains distinct charges that complainants were intentionally and fraudulently misled by Sheldon, with the knowledge and co-operation of Eggleston, into abstaining from seeking aid elsewhere, while Eggleston was at the same time getting up the claims that they were endeavoring to raise money to satisfy and remove; and has cut off their equity of redemption. While Sheldon is charged as being most active in the matter, Eggleston is the one who has secured the property, and is, therefore, the only one against whom any trust can be enforced, if it can be done at all; although all who took any part in the alleged conspiracy would be proper defendants.

In its general outlines the case here set up somewhat resembles that of *Laing v. McKee, 13 Mich., 124.* And if the bill contains sufficiently definite allegations, the fraud pointed out is one which, if made out, deserves redress.

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The bill is so drawn as to set forth a multitude of circumstances which are items of evidence merely, but which, standing alone, are not conclusive; and the allegations of fact, to which the evidence should be applied, are mainly left out. A bill should not set out at length the evidence on which the complainants rely, but should aver the acts of misconduct, and the other facts which, if sustained, would entitle them to relief. In the multitude of details and vague allegations in this bill, we have found but a single distinct allegation out of which an equity could possibly be raised.

But if Eggleston can be charged as having obtained these titles under such circumstances of fraud as to make him responsible, he is only chargeable for setting up claims which, under the circumstances, he should allow complainants to redeem. They have only offered to do this by having their original proposition carried out, that is, by a time loan. But we have already intimated this was not agreed on and cannot be required. If the circumstances are such that he should be compelled to allow a redemption, it can only be on the same footing with other persons holding liens which are redeemable, and which must be redeemed in money within some reasonable time. The bill is not framed on this theory.

It would not be proper to discuss the various inferences that might be drawn had the bill contained more definite allegations. Cases of fraud depend on so many circumstances, and involve so many mutual conditions, that we have no means of anticipating whether, when all the facts shall appear, it will or will not turn out that complainants can have any standing in court. There is enough, however, to make it proper, in affirming the decree dismissing the bill, to do so without prejudice to any future proceedings.

The decree must be affirmed, with costs, but without prejudice.

The other Justices concurred.

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Alida Riggs v. The Board of Education of the City of Detroit.

City of Detroit: Original plan: Interior open spaces: Common council: Land board. The interior open spaces in the original plan of the city of Detroit were, by the acts of the governor and judges and the early legislation of the territory, set apart to such uses as the city council of Detroit, in its legislative capacity, might "at any time" provide. The land board had no further power or control in the matter, and their subsequent attempt to confine the dedication was void.

Common council of Detroit: Legislative action: Action as land board. The acts of the council as a land board under the acts of congress were under a different authority from their legislative acts under the state or territorial laws, and they could not be legally identical.

Common council: Legislative action. The control of the uses of these lands was vested in the council as a legislature, and was to be exercised from time to time, and the uses were variable. It was not competent for one council to prevent legislative action by a future council, to change a former use.

Common council: Parks: Power to vacate: Public improvement. The city of Detroit has power to vacate any of its open spaces or parks at its discretion, when deemed a necessary public improvement, and of this the council is to judge for itself.

Public library: Public improvement. The use of a triangle in the old city plan, for a public library, is within the original purposes of the dedication, as well as within the power of the city under its authority to vacate open spaces for public improvements.

Plan of Detroit. History of the plan of Detroit referred to.

Submitted on briefs May 6. Decided May 7.

Appeal in Chancery from Wayne Circuit.

D. B. & H. M. Duffield, for complainant.

Alfred Russel, for defendant.

CAMPBELL, J.

The bill in this cause was filed to prevent the erection of a public library upon a space of ground of a triangular shape, bounded by Gratiot, Farrar, and Farmer streets, in Detroit, and spoken of as "Centre Park," in section seven of said city. Complainant avers that she owns a house and lot, which she purchased and erected under the belief that the land was to be continued as a park.

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The bill contains a recital of many facts, upon some of which we have information as recognized or fixed by public laws. The history of the parcel of land referred to appears to be substantially this:

In 1807, it is averred, the governor and judges adopted the plan of this section, under an act of congress of April 21, 1806, to provide for the adjustment of land titles in Detroit. Reference was made to this proceeding in *People v. Jones, 6 Mich., 182,* and it will be unnecessary here to review the whole subject, beyond what may be required for this particular case. The date of the adoption of this section was April 16, 1807.

The act of congress authorized them to lay out a town and adjust titles and make grants, and after satisfying all claims, to use the proceeds of the lands sold to build a court house and jail. The law required them to report their proceedings to congress, which, it appears from the statutes of the United States, was not done until required a second time by a statute of 1830. Their report is found in *Vol. 5, State Papers, "Public Lands."*

In 1806 a law was passed by the governor and judges, laying down a very vague outline of their proposed plan, defining one triangular section as *section 1,* and providing for other sections to be planned from time to time, subject to such deviation as might be found necessary. The portion of ground adopted by that act as the general basis of the city, was a triangle to be divided into six sections consecutively numbered. As the section where the place in controversy is situated, is section 7, and yet was included in that triangle, it is evident—as it is also very well known—that the plan was subjected to the deviations which had been anticipated. That act is only important in this controversy, as showing that the court house was to be placed in the Grand Circus, the largest public ground on the plan, and the jail was to be built in the vicinity of the court house. It was not until 1815 that this designation was repealed.—See *Territorial Laws, 143, 284.*

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In May, 1807, about the time when more of the sections were surveyed, and just after this section was adopted, a further law was passed, making regulations concerning the uses of the various public grounds, and the privileges of lot owners in the streets adjacent to their lots. Some portions of this act are quite important. By section 6 it was provided, "that the squares or other spaces where six and twelve avenues intersected should be planted with trees, as the lot owners fronting thereon should direct, or as the city council should at any time by law provide; *but so as not to impede or obstruct the purpose to which such public space of ground shall be converted, or may be designed.*" *p. 288.* At this time, as already seen, one of these purposes was declared by law to be the erection of a court house and jail. The Campus Martius and Grand Circus were the only spaces coming within this section.

By section 7, of the same act, provision was made for such triangular spaces as the one now under consideration. It is provided: "The internal space of ground, in the middle of every section, shall be reserved for public wells and pumps, for markets, for public schools, for houses for the reception of engines or other articles for the extinction of fires, and the preservation of the property of the inhabitants, for houses for the meeting of religious, moral, literary, or political societies, or other useful associations, and, generally, for such purposes of utility or ornament as the city council of Detroit may at any time, by law, provide; or as, otherwise, the inclination and tastes of the proprietors of the lots in such section, or the major part of them, may direct; and in the same manner shall be paved, graveled, planted with trees, or otherwise improved and ornamented." *p. 288.*

It will be observed that the regulations in regard to the large and small spaces differ in some remarkable particulars. In the large spaces the primary purpose is adornment with trees, subject to the other uses, and the power is given to the lot owners fronting on them, to see to the

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work until the city take it in hand. In the smaller spaces the primary purpose is for public improvements and buildings, and the ornamentation is secondary, and entrusted, until the city interfere, not to the adjoining lot owners, but to the proprietors of the entire section, or a majority of them. And in both of these sections the action of the city is contemplated as not a single and final and unchangeable determination, but action to be had "*at any time, by law,*" or, in other words, legislative action, which is not in its nature concluded by one exercise. Neither was immediate improvement contemplated.

Under this state of things, the first use to which this land was put was the erection of a jail upon it, in 1819, or thereabouts, which remained until removed, as the bill states, in 1849, by a decree of the circuit court for the county of Wayne. It is not stated under what pretense, and it is not very easy to determine, nor is it now important. Authority to use it was given to the county of Wayne by a territorial act in 1821.—*T. Laws, 857.* It was recognized and reserved by the act of congress which gave the residuary powers of the governor and judges to the city authorities of Detroit;—*5 Laws U. S., 541;* as was also the capitol building on the corresponding triangle west of Woodward avenue—the "court house," which was built there instead of on the Grand Circus, and in which the legislature met until the capital was fixed at Lansing.

The bill avers that after the removal of the jail no other use was made of the space; but it has been inclosed and ornamented as a park.

In 1855 the mayor, recorder and aldermen, acting as a land board, and not as a legislature, passed a formal resolution that this, with other similar spaces, should remain parks, and not be diverted from this character as public parks, or used for any other purpose.

March 17th, 1872, the common council vacated it as a park, and the land board afterwards conveyed it to the city, and the city have leased it to the board of education.

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The case is divested of some of the difficulties which have sometimes arisen in such controversies. As decided in *Baker v. Johnston, 21 Mich., 342*, if the original planning of the section amounted to a tender of this space for public uses, it did not specify those uses, and they could only be determined by subsequent action of some or all of the parties concerned. But the governor and judges, being the territorial legislature, and having it in their power, therefore, to regulate all these matters and remedy such uncertainties by law, saw fit to do so. They determined by law that certain uses should be permitted, but not specified or confined absolutely, and they then left the whole matter to be regulated by the local legislative action of the city. It would be a radical change if the power of the city to fix and regulate these uses "at any time" should be taken away. The power was to be exercised by the city under its chartered powers of legislation, and not otherwise. It had no powers to exercise for the United States at that time. And this power over the lands has never been taken away from the city by the state. The present charter allows the council to "control and regulate the same consistently with the purposes and objects thereof" (*Charter, p. 40*); and also to "vacate or abolish" any "public grounds or spaces in said city, whenever they shall deem it a necessary public improvement."—*Chap. 7.*

In *Hinchman v. City of Detroit, 9 Mich., 103*, the power of the city to vacate a portion of the *Campus Martius* was sustained, and it was held this might be done without determining in advance the future uses. And where private property is not taken, the right by authority of legislation to surrender or extinguish public rights has never been questioned.—*2 Smith's Lead Cas., 96; People v. Supervisors of Ingham, 20 Mich., 95.*

The vacating of the plat in the present case was no doubt done from abundant caution, and to secure the ultimate fee. But the purpose for which the land is to be used is directly within the original statute of dedication.

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The library is a public one, sustained and regulated by a public corporation for city purposes, and the use—if there can be any comparison of such uses—is much more general than the former one could have been. It is emphatically a public use, and one of the few to which special funds are expressly devoted by the constitution of the state.—*People v. Treasurer of Wayne County, 8 Mich., 392; Wayne County v. Detroit, 17 Mich., 390; People v. Controller of Detroit, 18 Mich., 445.* The power to vacate public spaces is very broad, but was not required in this case, as the use is within the dedication.

The action of the council in 1855, acting as a land board, whatever might have been its character, could not have restricted the power given by the charter in this regard. But we can conceive of no way in which that action could become important. Congress gave that body as a land board no legislative powers, and could give them none—for the powers of city legislation must come from the state. The act of congress merely transferred to the land board the residuary lands and funds, which had formerly been held by the governor and judges in the same capacity. They could not recall the action of their predecessors, nor meddle with lands they had disposed of. These lands had been dedicated to public uses in 1807, and had been used, and the deficiency that might have existed in the vagueness of the dedication was remedied by the statute of that year, which gave the city a broad discretion, and retained no control in the land board. Thenceforward the public interest was only subject to legislative interference by the city, or by the sovereignty of the territory or state. The action of the land board in 1855 was, therefore, nugatory, and beyond the jurisdiction of that body, and the land remained subject to the legal discretion of the city, to be exercised by its legislation for the public purposes indicated by the act of 1807, or such other purposes as would be lawful and not be repugnant to that act.

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The action complained of is in all respects conformable to law and to the objects of the dedication, and if it should be conceded (which is not to be understood as decided) that complainant has a right to intervene as a lot owner, she must take her property, and any supposed interest it gives her in the triangle, subject to such uses as are lawfully imposed upon it.

It follows that the bill makes out no cause of grievance.

The decree must be reversed, and the bill dismissed, with costs of both courts.

The other Justices concurred.

Elias H. Rawson v. Archibald Finlay.

Practice in circuit court: Pleadings: Questions of title to land: Evidence. Where an action of trespass commenced before a justice of the peace, has been certified to the circuit under the statute (*Comp. L. 1871, § 5630*), for the reason that it appeared from plaintiff's evidence that a question of title to land was involved, the fact that the defendant had failed to give notice with his plea, that title would come in question, does not, on the trial in the circuit, operate as an admission of the plaintiff's title, so as to exclude evidence of title in defendant; the case stands in the circuit subject to the same rules of proof and disproof as though it had been originally commenced there.

Pleadings: General issue: Evidence: Possessory right. Our statutory general issue, like the plea of not guilty, is a denial of all the material allegations in the declaration, and is sufficient to enable the defendant to contest all such allegations and to put the plaintiff upon the proof of all or any of them; and under it a freehold or mere possessory right in the defendant may be given in evidence.

Heard May 6. Decided May 13.

Error to Kalamazoo Circuit.

O. T. Tuthill and *Arthur Brown*, for plaintiff in error.

Hawes & Edson, for defendant in error.

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RAWSON v. FINLAY.

GRAVES, J.

Finlay sued Rawson before a justice of the peace, in trespass, and declared against him for a tortious entry upon certain of his premises described in the declaration, and for taking and carrying away therefrom a parcel of lumber belonging to him. Rawson pleaded the general issue, and gave notice that he should give in evidence that he found the lumber, and requested Finlay to take it away if it belonged to him. No other pleadings were put in. The parties proceeded to trial before the justice, and Finlay gave evidence tending to show that he was the owner of the premises claimed to have been trespassed upon. But Rawson not admitting Finlay's ownership, the justice certified the cause to the circuit court, pursuant to the statute. —*Comp. L.*, § *5330*. The cause coming on to be heard in the latter court, Finlay gave evidence tending to show that he drew the lumber in question on the land in controversy, in order to build a house, and that Rawson removed the lumber therefrom to his barn-yard on an adjacent parcel. Finlay gave no other evidence upon the question of title or possession.

Rawson then offered to show, among other things, an exclusive and adverse possession in himself for twenty years, and that he was the owner, and that Finlay had never been in possession. The court, upon objection, excluded the evidence and ruled that Rawson, having failed to give notice that title would come in question, thereby admitted title in Finlay, and the jury were instructed that if they found that Rawson entered upon the premises and carried therefrom Finlay's lumber, they should give him a verdict for the value of it. They accordingly returned a verdict in his favor for twenty-nine dollars.

We think the court erred in the view taken of the case, and of the statute. The regulations restricting the defense in special cases originating in justice's courts were not applicable to this cause. When the action went to the

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circuit court it was because the subject of title which Finlay found it needful to go into to maintain his case could not be tried by the justice, and the very object of the law in consigning the litigation upon such contingency to the tribunal having power to investigate and determine that subject, was to afford opportunity to settle in the latter, under the issue which had been joined, the identical question which had been raised, but could not be tried in the justice's court for lack of power.

The provision would be made nearly, if not quite, meaningless by a construction which would exclude a trial in the circuit court of the question raised by the plaintiff under the issue, and on account of which alone a transfer became imperative. When the cause was removed by reason of the attitude of the plaintiff, and as a consequence of his putting the title in question on his side, it stood in the circuit court, subject to the same rules of proof and disproof as though it had been originally commenced there. Finlay was bound to make out his case by evidence, and Rawson was at liberty to give evidence in defense according to the nature of the issue. It was therefore incumbent upon Finlay to show either an actual possession, or, if the premises were vacant, a legal title with the right of immediate possession, or other facts showing constructive possession; and these facts Rawson was at liberty to controvert by evidence in denial, or by evidence of his own possession, or, if the premises were vacant, by evidence of title and right of possession in himself.

There are, indeed, numerous defenses which have been decided to amount to admissions of the acts of trespass imputed to the defendant and of the possession of the plaintiff, and this, according to the familiar rule of pleading, that all material allegations not denied are admitted; and in all cases within the reason of the rule, the defense would only be admissible when pleaded specially, or, according to our practice, when properly indicated by a special notice. But the plea of not guilty, which has never been considered

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more comprehensive than our statutory general issue, is construed as a denial of all the material allegations in the declaration, and as sufficient to enable the defendant to contest all such allegations in evidence, and to put the plaintiff upon the proof of all or any of them, and under it a freehold or mere possessory right in the defendant may be given in evidence.—*Gould's Plead., § 8, ch. 6, pt. 1; §§ 91, 92, 93, ch. 6, pt. 2; 2 Greenleaf's Ev., § 625; Cooley v. O'Connor, 12 Wall., 391, and authorities cited.* See also *Kinnie v. Owen, 1 Mich., 249; Young v. Stephens, 9 Mich., 500; Edwards v. Chandler, 14 Mich., 471.*

I think the questions of title and possession were open to contest in the circuit court under the issue as it stood.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Elisha Harrington v. Lauren P. Hilliard and another.

Taxes: Real estate: Vendor: Vendee. Under our statutes, state, county and township taxes upon real estate become a lien upon the land from the first Monday in December of the year in which they are assessed and not before; and as between vendor and purchaser under a warranty deed, the obligation is upon the vendee to pay the taxes for the current year where the conveyance is prior to that date, and upon the vendor where it is subsequent.

Real estate: Taxes: Charge upon the owner: Statute construed. The provisions of the statute (*Comp. L. 1871, § 1006*) making the taxes upon real estate a charge against the person owning the same, on the second Monday of May, of the year in which they are assessed, construed in connection with previous statutes *in pari materia* and the general nature of our system of imposing and collecting taxes, and held to have been intended only as a cumulative remedy on behalf of the state, and not to make the taxes a charge upon the person or the land prior to the first Monday in December, when, for the first time, they exist as taxes, and the opportunity is offered, or the duty arises, to pay them. This provision does not affect the question of the obligation to pay the taxes as between vendor and purchaser.

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HARRINGTON v. HILLIARD.

Practice in supreme court. Where a case has been submitted below upon an agreed state of facts, upon a reversal of the judgment in this court on error, no new trial will be granted.

Heard May 7. Decided May 13.

Error to Wayne Circuit.

D. C. Holbrook, for plaintiff in error.

Pond & Brown, for defendants in error.

CHRISTIANCY, CH. J.

On the second Monday of May, 1871, the defendant below (plaintiff in error) was the owner and in possession of certain lands in Alpena county, and on the 31st day of October, 1871, sold and conveyed the same to the plaintiffs below by a warranty deed containing also covenants of seisin, against encumbrances, and for quiet enjoyment. The purchasers went into possession, and occupied the land on the first Monday in December of the same year.

In the month of November the state, county and township taxes of that year were ascertained, assessed and imposed upon the land, and extended upon the assessment roll, as required by law. In January following, these taxes were paid by the purchasers, to the collector of taxes (the township treasurer); and for the taxes so paid this action was brought against the vendor. The only question, therefore, is whether, as between the vendor and the purchasers, the vendor was bound to pay these taxes.

The statute requires the listing and valuation of the property upon what is denominated the assessment roll, to be made by the supervisor by the third Monday of May, and on the last named day, he is to attend at his office for the purpose of reviewing the assessment and hearing the objections of persons interested, to the valuations as made by him. This, though called an assessment roll, is but a list of the taxable persons, and the property and its valuation in the township; and after it is thus completed by

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the supervisor, it is submitted to the board of supervisors, at their October session, for the equalization of the valuations in the several townships, which may alter, and generally does alter, the valuation as made by the supervisor. When thus equalized by the board, the roll is again delivered to the supervisor with a certificate of the amount of the various taxes to be raised in his township; and the supervisor, between that time and the first Monday in December, is required to apportion the amount and impose the taxes according to such equalized valuation, and to place the roll in the hands of the township treasurer for collection. And it is from this date that the statute declares the taxes upon real estate to be a lien thereon.

It is therefore clear that, up to this time, there is no tax upon the land which can be paid by or to any one (nor until about this time could the amount be in any way ascertained), and the land is just as clear from any charge or lien on account of the taxes to be assessed for the current year, as it is from those of any future year.

They cannot, therefore, in the nature of things, constitute, before that time, an incumbrance on the land. There is simply a liability to future taxation—a liability which always exists—and it can make no difference in principle, so far as relates to the question of incumbrance, whether it is liable to be taxed one month or one year or ten years hence. In the absence of any statute, therefore, giving to this liability the effect of a lien before the tax is imposed, such liability to future taxation cannot constitute a breach of any covenant in a vendor's deed, made a month before the imposition of the tax.

But it is insisted that the tax upon the land is, by the statute of 1871 (*Comp. L. 1871, ch. 21, § 40*), made a personal charge upon the person who was the owner of the land on the scond Monday of May, and makes it his duty to pay it; and that, though the treasurer is authorized to collect it from the property of the vendee who purchased it after that time and before the first Monday of December, and

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owned and occupied it at the last named date, yet the vendor is the party primarily liable, and the vendee, in paying it, pays it for him, and may therefore recover it of him as so much paid for his use and at his request.

This section is in these words: "The taxes assessed upon any real estate of any resident or non-resident, and all legal charges made thereon, shall be a charge against the person owning the same on the second Monday of May, and shall be a lien on said real estate from the first Monday in December of the year in which such real estate was assessed; but it shall be lawful for the township treasurer to collect such taxes by distress and sale of the goods and chattels of any person who shall purchase such real estate after the second Monday in May, and occupy the same on the first Monday in December."

A hasty glance at this section, without reference to previous statutes *in pari materia*, or the general nature of our system of imposing and collecting taxes, might seem to establish beyond doubt the theory of the plaintiff below, and to make the vendor liable in the present case. But, though it is clear the statute makes these taxes, after they are imposed, and the roll has gone into the hands of the treasurer for collection, a charge upon the person owning the land on the second Monday in May, it does not make them a charge from that day, nor until the taxes have been imposed; until then there is no charge nor any duty to pay, as no such taxes yet exist, and the owner could not pay them if he would. The fair interpretation of the statute is, that they become such charge on the first Monday in December, at the same time they are declared to become a lien upon the land. This period is intended to correspond with the time when the imposition of the taxes, for all legal purposes, is to be considered as consummated, and when, for the first time, the duty to pay springs into existence for any purpose. But, though the taxes then take effect as a charge in behalf of the state upon the person who owned the land on the second Monday in May, the

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real question is, whether this charge upon him, and his liability to the state, creates any duty to pay it, *as between him and these vendees*, who became the owners of the land before the taxes became a charge upon the land or the person, and before the taxes had an existence; or whether it was only intended as a cumulative remedy on behalf of the state, to enable them more speedily to collect the taxes. For the decision of this question, it is proper to consider some of the essential features of the system of collecting taxes which has prevailed in this state, and to refer to some of the statutes upon the same subject, to see by what steps or changes the section above cited assumed its present form.

Every state has its own peculiar system and mode of imposing and collecting taxes. I have not had access to enough of the statutes of the other states to enable me to trace all the features of their various systems in force when their judicial decisions were made which have been cited in the present case. But in some of the eastern states, Vermont, for instance, a system did, if it does not now exist, which treated taxes much in the light of ordinary debts between individuals, and, without making the tax a specific charge or lien upon the land taxed, or authorizing proceedings properly *in rem* against the land, authorized the collector to levy for the tax, not only upon the goods and chattels of the owner taxed, but upon any of his real estate, whether taxed or not, and to sell the same for the tax, much as is done in this state upon execution.—See *Rev. Statutes of Vermont, (Ed. of 1840), Title 19, chapter 77.* In Massachusetts the collection of taxes seems to have been placed upon a somewhat similar footing, the collector being authorized to sell the land (for want of goods and chattels) for the taxes, in a mode somewhat similar to a sale upon execution; but making the taxes a lien upon the land taxed for two years only after the taxes were committed to the collector for collection, but no longer, if the lands had, in the meantime, been sold. This lien was clearly imposed

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for the benefit of the state in collecting the tax; and but for this statute the lien would not, under their statutes, have existed. Their mode of valuation and assessing the taxes is also essentially different from ours. The judicial decisions of those states, therefore, upon a question of this kind, can have very little bearing here.

From the first establishment of our system of taxation under the state government down to this day, taxes upon land, whether of residents or non-residents, have not only been imposed specifically upon the land—and the person of the owner when a resident—but in case of non-payment to the collector, or non-collection by him from the personal property of the resident person taxed, the proceedings for their collection have been strictly *in rem* against each specific description of the land taxed; and this, whether the owners were resident or non-resident; and, if not paid or collected, the lands were required to be returned with the taxes upon each specific description, and sold for those particular taxes and the charges thereon. The main difference between the resident and non-resident taxes being, that as to the former, the collector was authorized to levy upon, and sell for the tax, the personal property of such resident, who owned the land at the time the listing and valuation were made in the spring (which therefore made the tax a personal charge upon him), while in the latter case, the collector,—previous to the enactment of the section now in question, at least,—could not levy upon personal property; but if the tax were not paid to the collector, the land was returned and sold, etc., as in the former case. In other words, the proceedings from the valuation of the land and the imposition of the taxes till their final collection, have been *in rem* against the land itself, as well as against the owner or person taxed, if the latter were a resident. And no express provision making the tax a lien was ever necessary under this system, to make it a lien, so far as the rights of the state or the public were concerned; as this was the necessary effect and direct result of the system

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itself. Nor was there ever a time in this state when the rights of the public or the state, to enforce a payment from the land itself, were in any manner affected by the sale, or any number of sales of the land.

But, as such sales might frequently take place, and the rights of successive owners, *as between themselves*, might depend upon the question whether there was any tax upon the land when it was conveyed, in other words, whether the tax had in effect been imposed and become a charge upon the land while it belonged to the vendor (and, therefore, ought, as between them, to be paid by him), or whether it was imposed and became a lien after the conveyance to the vendee, and therefore ought to be paid by the latter, and there might be difficulty in showing the precise time when the supervisor had actually completed the imposition and carrying out of the tax upon the roll; it was thought judicious expressly to declare and fix by the statute a certain day when the tax should, for this purpose, be considered as taking effect as a lien upon the land. Accordingly in 1842 (*Laws of 1842, p. 90*, § *21*) it was, for the first time, expressly provided that, "The taxes assessed upon any real estate of any resident or non-resident, and all legal charges made thereon, shall be a lien on said real estate from the first day of November of the year in which such real estate was assessed." This corresponded very nearly, though not exactly, with the time when the warrant was required to be given to the township treasurer for the collection of the tax, which was the first Monday of November. This provision was continued in the revision of 1846, in the same words (*chapter 20*, § *36*) and the warrant for collection was required to be given to the township treasurer between the 25th of October and the first of November (*sections 32 to 34 inclusive*). The same provision, in the same words, was contained in the law of 1853 (*Sess. L. 1853, p. 140*, § *38; Comp. L. 1857*, § *820*). This statute, it is true, did not require the warrant to be delivered by the supervisor to the treasurer until the 15th day of November; but all the

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data to enable the supervisor to impose and extend the taxes were required to be put into his hands in October, and he was thereupon to proceed to extend and impose the taxes, which could readily be calculated and ascertained from those data. But by section 38 of the act of 1858 (*Sess. L. 1858, p. 183*), the time when the lien was declared to take effect was changed to the fifteenth day of November, and here occurs for the first time the provision expressly making the taxes a charge against the person owning the land in the spring, in the same words as found in the act of 1869, and the amendment of 1871, except that the charge is upon the person owning the land on the second Monday in April.

From the first provision expresaly making the tax a lien, in 1842, down to the time of the act of 1858, expressly making the tax a charge upon the person owning the land in the spring, when the valuations were made, we suppose no lawyer in the state ever doubted that the purpose of the provision making the tax a lien upon the land, was to settle the question, as between successive owners of the land, which of them ought to pay the tax; all agreeing that, if conveyed before the day when the lien was thus made to attach, the vendee must pay the tax of that year. The provision was required for no other purpose, and could take effect in no other way. No other purpose, therefore, can be assigned for its enactment. So far as the rights of the state and the public were concerned, the tax, after it was imposed, had always been under our system a lien upon the land; and the owner when the land was taxed in the spring, or the person taxed, had always been liable personally for it, as between him and the public; but this fact in no way made him liable, as between himself and his vendee, if he conveyed the land before the lien attached. The state may adopt cumulative remedies against both vendor and vendee, as well as against the land, without affecting the rights of successive owners, as between themselves. And up to 1858, if the taxes in a case like the present, were

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collected of the vendor, we see no reason to doubt his right to recover the amount of the vendee.

The provision for a lien has been continued down to the present time, but since 1858, it is found in a section which is prefaced by the provision making the taxes a charge, substantially as we find it still in the act of 1869, as amended in 1871.

We are now to inquire what is the effect of this provision making the taxes a charge against the person, whether resident or non-resident, who owned the land on the second Monday in May.

As against a resident owner, owning the land in the spring when the listing and valuation were made, or the person taxed, the taxes subsequently assessed for that year had always been a personal charge, as between him and the public, and might be collected of him by distress and sale of his goods, though he might afterwards have sold it before the tax was imposed. No express provision was necessary, therefore, to make it a charge as to him; and, as to him, this provision would therefore have no effect. But it had always been otherwise as to the non-resident owner; as to him, the tax had always been against the land, and not a charge against him personally. The collector, therefore, could not levy upon his personal property for the tax, whatever amount of it he might find in the township. As to him, therefore, some such provision was necessary to effect this object, and to place the resident and non-resident, in this respect, upon the same footing; and this, we are satisfied, was the real and only object of the provision, and it can only properly take effect in this way. It is unnecessary to inquire how far this object can be carried into effect, though, taken in connection with the other provisions of the tax law of 1869, it gives the township treasurer the power to assume the risk of ascertaining such ownership of the land on the second Monday of May, and to make the levy upon the personal property of such owner. Whether he could be compelled to decide the question of

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the title to the land, and to make the levy upon the personal property in such case, is another question which we need not here decide; but in this respect the provision involves the same questions involved in the amendment of 1871, authorizing the treasurer to levy upon, and sell for the tax, the personal property of an owner of real estate purchased by him between the second Monday of May and the first Monday of December.

We are entirely satisfied that the provision making the tax a lien upon the land from a certain day was enacted for the purpose of fixing the period upon which the liability of the successive owners, as between themselves, to pay the tax, was to depend; and that the superadded provision, making the tax a charge upon the person of the owner, does not alter its effect in this respect.

Much reliance was placed by the counsel for the defendants in error, upon the decision of the New York court of appeals, in *Rundell v. Lakey, 40 N. Y., 513*, where the majority of the court laid down a rule which, if their statutes and course of legislation were the same as ours, would hold the defendant below liable in this case. Not having access to all the statutes of New York, we are not able to say how far the reasoning in that case would be applicable; but we think it will be found that the course of their legislation upon this question has been so different from ours as to make the decision inapplicable.

The judgment of the circuit court must be reversed, with costs; and as that judgment was based upon an agreed state of facts, no new trial can properly be granted.

The other Justices concurred.

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The City of Detroit v. Joseph P. Whittemore.

City counselor: Official duties: Services: Quantum meruit. The city counselor of Detroit being required by the city ordinances to appear as attorney and counsel in behalf of the city in all suits, prosecutions or proceedings, brought in any circuit court or the supreme court of the state, or in any United States court, by or against the city, or any board thereof, etc., and to prosecute or defend therein, to the termination thereof, and his official bond being required to be conditioned for the performance of all his duties as prescribed by the charter and ordinances, one who has, previous to his appointment as such counselor, been employed to bring and carry through to its termination a suit in behalf of the city, cannot recover on a *quantum meruit* for services in said suit performed after he became city counselor, in the absence of any agreement that the business of carrying on such suit, though falling within his official duties, should not be considered as included among the services paid for by the annual salary, but should be compensated for in some other way.

Attorney: Compensation: City counselor: Official duties: Salary: Services. An attorney employed to carry a suit through for an agreed sum has a vested right to the compensation when he accepts and begins the service; and the subsequent appointment of such attorney to a position where it would become his official duty thereafter to conduct such suit to its termination by virtue of his general employment, would not prevent him from recovering the sum agreed upon under the private contract; but if the original employment were to conduct the suit to its termination for such compensation as the services should be reasonably worth, he could only recover the value of his services prior to such appointment.

Attorneys: Employment: Agency. The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business.

City counselor: Official duties: Appointment: Previous arrangement: Merger. Where the duties performed by one holding the position of city counselor are official duties, such as that officer is by law required to perform, and such as by his official bond he has agreed to perform, it is impossible to infer, in the absence of any express contract to that effect, entered into when he accepted the appointment, that such duties were to stand apart from the official duties in general, and to be paid for separately, because of some previous understanding which was had when the official appointment was not contemplated; all such previous understandings will be regarded as terminated by and merged in the appointment, unless otherwise expressly agreed.

City counselor: Salary: Evidence. In this suit, which is framed and conducted on the theory that the services for which recovery is sought were excepted by the previous understanding, from the official duties of city counselor for which the salary was intended as compensation, and not on the theory that no compensation was fixed and allowed by the city authorities for the performance of the official duties, it is immaterial that it was not shown by the city that any official salary was paid to the plaintiff; the compensation fixed for the performance of the duties of city counselor covers so much of the services in question as were performed after the appointment of the plaintiff to that office.

Heard May 7. Decided May 13.

Error to Wayne circuit.

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D. C. Holbrook, City Counselor, for plaintiff in error.

George H. Prentis, J. P. Whittemore and *Henry M. Cheever,* for defendant in error.

COOLEY, J.

It is a disagreeable task when a court is required to decide that a party who has performed for another a large amount of labor under the expectation on his part of reasonable compensation has no remedy in the law to compel payment. And such is the task we are required in this case to perform.

In 1868 Mr. Whittemore was employed by the city of Detroit, through a committee of the common council empowered for the purpose, to commence in the Wayne circuit court, and to carry through the several courts, as might be necessary, an important suit against the Detroit & Milwaukee railroad company. The employment seems to have contemplated that a case would be agreed upon between the parties, and Mr. Whittemore was to have an assistant selected by himself, and the whole expense was not to exceed five hundred dollars. The railroad company, however, declined to agree upon a case, and it became necessary to commence and carry on the suit in the usual way, and a large amount of testimony had to be taken. For some reason not explained no assistant counsel was called in, and the common council seem to have been satisfied to leave the whole matter in Mr. Whittemore's hands, and the city would therefore be under obligation to pay the whole of the five hundred dollars to him. There is some evidence from which it might be inferred that when it was found a case could not be agreed upon, the council, or its committee, were notified that the suit could not be carried through for the sum named, and that the case proceeded afterwards on an understanding that Mr. Whittemore should be paid what his services were reasonably worth. In July, 1869, he was appointed city counselor of Detroit, and acted

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as such from that time until January, 1872. The suit was pending in the circuit court at the time of his appointment; it was brought to a hearing in the following year, and after decision, was carried by appeal to the supreme court, where it was argued by Mr. Whittemore, and finally decided in 1871. When it was concluded, Mr. Whittemore presented his demand to the common council for settlement, claiming a fair compensation, irrespective of the original understanding. The council allowed him five hundred dollars only, and declining to take this, he brought suit. A jury has awarded him two thousand dollars as the fair value of his services.

The count in the case is upon a *quantum meruit*. Various errors are assigned in the record, but the only one we propose to consider is the charge of the court, that if Mr. Whittemore was employed by the city, previous to his appointment as city counselor, to conduct the case to its final termination, then he is entitled to recover what his services are reasonably worth, even though some portion of the services were rendered after such appointment. The whole controversy is covered by this charge, and if incorrect, the judgment cannot stand.

The office of city counselor of Detroit is a statutory office, and the term of office, duties and compensation are prescribed by the common council.—*Sec. 2, ch. 2 of Charter.* Section 3, of chapter 5 of the city ordinances, provides that the counselor "shall appear as attorney and counsel in behalf of the corporation in all suits, prosecutions or proceedings which shall be brought in any circuit court, or in the supreme court of this state, or in any United States court, by or against said corporation [the city], or any board thereof, or which, when brought, shall be removed in any mode whatever, from such circuit court into the supreme court, and as the case may require, shall prosecute or defend therein to the termination thereof." Another section requires of him an official bond, which is condi-

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tioned "for the performance of all his duties as prescribed by the charter and ordinances of the city."—*Sec. 12, ch. 5.*

From this enumeration of the duties of city counselor it will be preceived that the conduct of the suit against the Detroit & Milwaukee railroad company was a part of the official duty of that officer, which he was bound to perform for such compensation as the council should prescribe, and which in an official bond he must have undertaken to perform under a penalty. Had Mr. Whittemore come into the office without having had any previous connection with the case, no question whatever could have been made, that it would have been his duty to take up the case in the condition in which it then was, and conduct it to a conclusion. It would have been equally unquestionable that the salary appropriated by the common council to the office, must have covered all the compensation to which by law he would be entitled. Had he been connected with the case previously under an ordinary retainer which the city might terminate at the will of the council at any time, the same result must have followed. He could have demanded a reasonable compensation for all services performed by him previous to his appointment as city counselor, but all performed afterwards, falling within the duties of the counselor as enumerated in the ordinance, must have been considered as performed in that capacity.

But it is urged in support of the judgment below, that this case is distinguishable, because Mr. Whittemore had previously been employed to conduct the suit through all the courts. His appointment to an office, it is said, could not put an end to a contract previously existing and not yet fully performed. This is doubtless true as a general proposition, but whether it is so in the particular case may perhaps depend upon the nature and terms of the employment. If the city had previously had no official adviser, and had employed Mr. Whittemore as private counsel to manage all its litigation for the year, but before the year was up had chosen him city counselor and he had accepted

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the office, it would not, we presume, be seriously urged that he might continue and recover compensation under the original employment, and at the same time hold the official position as a sinecure, and receive the salary as if he had officially performed the duties. This may be a very extreme illustration of what might possibly occur, but it remains to be seen whether the ruling of the circuit judge would not justify such a course and such a recovery.

It must, probably, be conceded that the city, having authority to employ private counsel, has the right also in making contracts for the purpose, to enter into such stipulations as natural persons would be at liberty to make. Among these would be, the right of agreeing at the time of retainer what the compensation should be for the whole service then supposed likely to be required. We do not doubt that the common council, when they first employed Mr. Whittemore, were entirely at liberty to agree that the compensation to be paid him should be a round sum specified, for managing the suit from its institution to its conclusion. We may also concede that the appointment of a person thus employed to the office of city counselor, would not, in the absence of any qualifying facts, have any effect to diminish the compensation agreed to be paid under the previous retainer. But to reach this conclusion it would not be necessary to hold that the services performed in the suit after the office was accepted, were performed under the original contract and not officially, because the conclusion would be the same whether it was so held or not. An attorney employed to carry a suit through for an agreed sum has a vested right to the compensation when he accepts and begins the service; and he cannot be lawfully deprived of it except by his own consent or through his own default or misconduct. If he is discharged from the employment before the service is completed, he may recover the whole sum; and if we take the exact case before us, and regard the appointment to the city counselorship as a termination of service under the private contract, the sum

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agreed upon may still be recovered, because of the manifest impossibility of making an apportionment of the services and compensation, when the parties themselves by their contract expressly abstained from making any, and may in fact be said to have agreed that none should be made.

But the theory of this case is, that after it was found the railroad company would not agree upon a case, the previous agreement to perform the whole labor for a sum in gross was abandoned, and that the case proceeded afterwards on an understanding that a reasonable compensation should be made for the services from commencement to conclusion. The only thing to distinguish this case, then, from an ordinary retainer is, that in ordinary cases an attorney is employed during his client's pleasure only, while in this case, it is claimed, the employment was expressly till the case was concluded. Whether the cases are at all different in the law, we will not stop to consider. The position of the defendant in error is, that by this express employment the case was taken out of the category of services for which the common council, in fixing the salary of the office, would provide official compensation, and left to be governed by the previous contract.

The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business. The clerk of a merchant, the servant of a corporation, the laborer in a factory or on a farm, will recover his compensation on the same principles. If under the like circumstances of special employment, one of these parties should enter into the general service of his employer before the special service had been fully performed, and should afterwards demand payment for that service, after having received the agreed compensation under the general employment, the case would be precisely analogous to the present. And it will not, therefore, be inappropriate to make use of such a case by way of testing the proper rule to apply in this.

In order to see where the doctrine would lead us, we

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may, then, suppose a master mechanic to have employed another to construct a certain building for him, on the understanding that he was to complete it fully, and receive such compensation as the labor was reasonably worth; and that after having partly constructed it, the employer should decide to take the workman into his general service at an annual compensation agreed upon, and from that time such workman should give his whole time to the employer, indifferently on the building he was to construct and on other work; could it be seriously contended when the building was completed, that the laborer was justly entitled, not only to the annual compensation agreed upon, but also to the whole value of the services performed in erecting the building, whether before or after the general employment? On the contrary, would not the inference be irresistible that in the understanding of the parties the general employment must have terminated the special arrangement, and that whatever was done afterwards was under such employment?

A proposition in the case of a mechanic so plain and simple, seems scarcely to admit of argument, or capable of being strengthened by illustration, but the case before is at least equally clear and plain. Mr. Whittemore was employed to carry on a particular suit for a reasonable compensation. After it had been in progress for a season the common council, gratified doubtless with the manner in which it was being conducted, decided that it was best not to confine his employment to the single suit, but to extend it to all their litigation in the higher courts. For this purpose they resorted to the proper and usual mode; that is to say, they appointed him city counselor. He accepted the appointment. It was not necessary to make a bargain as to his official duties, for the law then in force defined them, and they embraced all the litigation referred to. The law also declared that the compensation for the whole should be such sum as the common council should prescribe. He took the office with the law before him, and he agreed in his official bond to discharge all the duties thereof.

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Now we do not say that it would be incompetent for the common council at the time of the making and accepting of such an appointment, to agree with the person appointed that any particular business, though falling within his official duties, should not be considered as included among those paid for by the annual salary, but should be compensated in some other way. That case is not before us, and when it shall arise, the salary will probably be fixed with reference to the special facts. All that we now say is this: Where the duties to be performed are official, and by law the city counselor is required to perform them, and by his bond agrees (as we must presume he has done) to do so, it is impossible to infer, in the absence of any express contract entered into when accepting the appointment, that any such duties were understood to stand apart from the official duties in general, and to be compensated for separately, because of some previous understanding which was had when the official appointment was not contemplated. The law can draw no such inference; it can imply no promise under such circumstances. On the contrary, all previous understandings having reference to services which it now becomes the duty of the counselor to perform officially, must be regarded as terminated by and merged in the appointment, unless otherwise expressly agreed. We see no escape from this conclusion. When the law implies that a particular service is already paid for by an official salary, it can raise no implication of an agreement to pay for it separately; for such an implication can only rest upon a legal duty, which, in the case supposed, is already presumed to have been performed.

It is suggested, however, that it was not shown by the city that any official salary was paid Mr. Whittemore. But this is immaterial to the present suit. What we decide is, that the compensation to be fixed by the council for the performance of the duties of city counselor covers the services for which this suit was brought. This suit is not framed or conducted on the theory that no such compensa-

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tion was fixed and allowed, but on the theory that these services were excepted from the allowance by the special understanding. As we find it impossible to support that theory, the judgment cannot stand. The plaintiff, on the facts, as they appear in the present record, should have been limited in his recovery to the sum of five hundred dollars, unless the jury were satisfied that the original agreement for that sum was abandoned by consent, in which case he was entitled to a reasonable compensation for all services performed previous to entering upon his duties as city counselor, and to nothing afterwards.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Stephen O'Brien and another v. Christopher Kusterer and others; and James Irons v. Stephen O'Brien and others.

Landlord and tenant: Fixtures: Realty: Personalty. A bar, bar fixtures, cupboard, bowling-alley ways and racks, attached by a tenant to a building occupied by him as a saloon under a lease, held to be permanent fixtures, so annexed to the freehold as to belong to it and become the property of the landlord, and not to be removable by the tenant's vendees.

Landlord and tenant: Fixtures: Personalty: Estoppel: Waiver. The tenant's sale of these fixtures as personalty and the taking back of a chattel mortgage upon them as such, could not by itself invest him with any new right as against his landlord, or affect the right of the landlord derived from the previous annexation of them to the freehold, in the absence of any showing that the latter in some way waived or relinquished his rights, or assented to the tenant's dealing with them as things removable.

Heard May 7 and 8. Decided May 13.

Appeal in Chancery from Kent Circuit.

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J. W. Champlin, for complainants in original bill.

Jacob Ferris and *A. T. McReynolds*, for complainant in cross-bill.

James A. Rogers, for defendants Kusterer and Conkey.

Graves, J.

On the 13th of August, 1868, the complainants in the original bill, O'Brien and Calkins, leased to the defendant Kusterer and one Werner, for three years from the 15th of the succeeding September, the east basement of Phœnix hall, in Grand Rapids, for an eating house or saloon, at a yearly rent of six hundred dollars, payable quarterly. The lessors, at considerable expense, fitted up the property with a bar and other conveniences to adapt it to the business to be carried on by the lessees. Some time in the fall the lessees entered under the lease. In some little time afterwards one Schoeding became associated with Werner, and the room was extensively altered and fitted up by the tenants with bowling-alleys, which were put down and connected with the floor and sleepers in a very substantial manner. The changes were numerous and thorough, and the character of the establishment was completely altered. In the course of a few months the defendant Kusterer united in himself the whole leasehold interest, by purchase or otherwise, and on the 24th of May, 1870, assigned to the defendant Conkey, and took back a chattel mortgage to secure three hundred and fifty dollars of the purchase price. In this transaction Kusterer assumed to sell and take back a mortgage upon the alleys and other fittings, and they were described in the mortgage as "all and singular the bar, bar fixtures, ice-box, four bowling-alleys, with the balls and pins appertaining thereto, with all the chairs and tables therein, one chandelier over the bar, two street lamps and signs, with all keys, faucets, stock on hand, and all

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fixtures and furniture,—all in the Court Place saloon, so called,—in the basement of the Phœnix block, so called, on the north side of Lyon street, in said city of Grand Rapids, being the same property this day sold by said Kusterer to said Conkey, and this mortgage being given for a part of the purchase price thereof."

About June 1st, 1870, Conkey sold the same property to James Irons, the complainant in the cross-bill, for the consideration of one thousand and fifty dollars, and Irons assumed, as part of the consideration, the payment of the chattel mortgage given by Conkey to Kusterer. At this time Kusterer assured Irons that the property was "all right," and that he would "stand between him (Irons) and all harm." A controversy had previously arisen between the complainants in the original bill, O'Brien and Calkins, and Kusterer, as to the ownership of the alleys and some other things in the establishment.

O'Brien and Calkins claimed that the bar, bar fixtures, cupboard, bowling-alley ways and racks, were permanent fixtures and belonged to them as owners of the reversion, and the defendant Kusterer insisted that they were removable articles and subject to and held by his mortgage from Conkey. The mortgage becoming due, and Irons declining to pay it while the title to the property was thus in dispute, Kusterer threatened to enforce his mortgage lien and remove the property from the premises. O'Brien and Calkins thereupon filed the original bill to prevent any interference with, or removal of, the property claimed by Kusterer, and to restrain the alleged injury and waste which a removal would be likely to produce. Irons then filed the cross-bill to protect his interests as they should be affected by results.

The circuit court, in passing upon the case of the original bill, decreed that the bar, bar fixtures, cupboard, bowling-alley ways and racks were fixtures attached to the building, and owned by complainants, and awarded a perpetual

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injunction; and in passing upon the cross-cause adjudged that the defendant Kusterer should pay to Irons nine hundred dollars, with interest thereon from June 24th, 1870, in the place of the fixtures.

But two questions were made on the hearing in this court. The first being whether the things in question were so annexed to the freehold as to belong to it. This question is decisively answered in the affirmative by the evidence, and it would be a waste of time to repeat it.

The second question is whether Calkins' conduct was such as to estop himself and O'Brien from claiming, against the mortgage rights of Kusterer, that the property was permanently and immovably attached, and I think upon a fair estimate of the evidence this question should be answered in the negative.

Kusterer was a tenant holding of Calkins and O'Brien when the annexations were made, and they are to be considered as made by his direction and authority, or at all events, with his sanction; and by itself, his sale of the things so annexed, as personalty, and the taking a chattel mortgage back upon them, could not invest him with any new right as against his landlord. Such a transaction, standing alone, could not affect the right of the landlord derived from the annexation. It might tend more or less to show that the tenant did not consider the fixtures immovable. But the landlord would not be concluded, unless shown in some satisfactory way to have assented to their being dealt with by the tenant as personalty, or things removable.

The fixtures now in question were made a part of the realty, so far as mechanical annexation could make them so, before Kusterer sold to Conkey and got the mortgage back; and the evidence does not show that when that annexation occurred, it was one which left the tenant at liberty to sever and remove what was annexed. When this transaction with Conkey occurred, Kusterer had no title, as

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against O'Brien and Calkins, to these things as personalty, and he gained none by the mortgage from Conkey, unless O'Brien and Calkins in some way waived or relinquished their right derived from the annexation, or precluded themselves from asserting it against him, and this I think the evidence, when fairly considered, shows they did not do.

The decree below should be affirmed, with costs.

The other Justices concurred.

Lucius E. Buck and others v. The First National Bank of Paw Paw.

Promissory notes: Consideration: Evidence: Admissions. In an action by a bank upon promissory notes given by the relatives of one who has robbed the bank, and claimed to have been received in consideration and settlement of the indebtedness of the criminal to the plaintiff growing out of such robbery, it is competent for the defense to show the amount of such indebtedness as bearing upon the consideration of the promise sued upon; and upon this question the defendants are not concluded by the admissions of the criminal upon a settlement with the bank, but may show the facts.

Evidence in such an action, of admissions by the criminal that a lot conveyed by his mother in part payment of his indebtedness to the plaintiff prior to the giving of the notes sued upon, was purchased with money belonging to the plaintiff, is irrelevant; the fact that the lot was conveyed in reduction of the indebtedness was material, as it operated as a payment to that extent, but what equitable claim the plaintiff had to such conveyance aside from the indebtedness, was immaterial.

Promissory notes: Defense: Payment of interest: Good faith: Presumption. The fact that the defendants at an interview when interest on the notes was arranged, but before the principal fell due, made no objection to the payment of the notes, and paid the interest which fell due before the maturity of the principal, would not raise a presumption against the good faith of the defense afterwards set up in this case; the notes being negotiable, it was not inconsistent with an intent to make the defense eventually, that they should keep silent about it until the whole sum fell due, and so conduct themselves as not to excite the alarm of the plaintiff and thus cause him to negotiate the notes.

Promissory notes: Consideration: Public policy. A note given to a bank in consideration of assurances on the part of its officers that they would sign a petition to the judge for clemency towards a relative of the makers who is under arrest for robbing the bank, or that they would be more likely to do so, or that in any manner they would exercise, or be more likely to exercise, influ-

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ence with the court to secure a lighter sentence, is based upon a consideration opposed to public policy, and is consequently void; and this upon the ground of the tendency of such an understanding to encourage deception of the judge, and to mislead him in the facts upon which his judicial action should be based.

Promissory notes: Consideration: Evidence. Neither the sympathy of such relatives nor their relationship to the criminal could have any bearing upon the case, since neither of these separately, nor both together, could constitute a legal support to the promise; nor, provided the only inducement to make the promise was the desire to shield their relative, is it material, as between the makers and the bank, that the criminal was indebted to the bank to the amount of the notes given.

Heard May 9. Decided May 16.

Error to Van Buren Circuit.

Foster & Coleman and *F. Muzzy*, for plaintiffs in error.

Thomas H. Stephenson and *Severens, Potter & Boudeman*, for defendant in error.

COOLEY, J.

Suit was brought in the court below upon a promissory note given by the plaintiffs in error, in part payment, as it is claimed, of an indebtedness to the defendant in error, of one R. M. Buck. The main facts which led to the giving of the note are not in dispute. R. M. Buck had robbed the bank of a large sum, and had absconded. After a long search he was found, arrested and brought back to Paw Paw. The officers of the bank kept him in custody for a while before handing him over to the authorities, and during this time a large portion of his indebtedness to the bank was arranged by his turning over his own property, and by his mother deeding to the bank a lot to which she had title. The plaintiffs in error were relatives of R. M. Buck, and during the same time they were induced to give to the bank certain notes, of which the note in suit was one. It was claimed on the part of the bank that these notes were applied in payment as far as they would go, but that a considerable balance still remained. R. M. Buck was delivered to the authorities on a complaint for

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the robbery of the bank, the same day the notes were given, and he was convicted on plea of guilty, and sentenced to the state prison. When this note fell due, the makers refused to pay, claiming their signatures were obtained by means of illegal inducements held out to them that R. M. Buck should not be prosecuted, or should be favored in the prosecution if they would give them. The bank brought suit and has recovered judgment, which is before us for review on exceptions.

The exceptions are numerous, and a number of them which we think not well taken and not important, we shall not discuss. As to others, it will be sufficient to state the general principles which were applicable and should have been applied. It is complained among other things that the court excluded questions put to witnesses by counsel for the defense, designed to place before the jury the amount of the indebtedness of R. M. Buck to the bank at the time these notes were given. As it was claimed by the bank that that indebtedness was the consideration for the notes, any evidence which would go to show that R. M. Buck did not owe the bank the sum represented by the notes was clearly admissible for the purpose of showing that on this theory the notes were given without consideration. And in this connection it may be proper to state that we think the court erred in charging the jury that in determining whether there was an indebtedness from R. M. Buck to the bank at the time this note was given, if the jury find from the evidence that upon an accounting between the bank and said R. M. Buck, prior to the giving of the notes, there was a balance agreed by said Buck to be due the bank, then it is not competent for these parties to contest the question of such indebtedness, upon the ground of any pretended unfairness in such settlement, nor upon the ground that Buck was under duress at the time, and that such defense, if the facts existed to support it, could only be urged by R. M. Buck himself. The court in giving this charge treated the case as if it were one of a contract by

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R. M. Buck to which he might have a personal defense of duress if he saw fit to resort to it, but which the law would permit no one else to make if he did not. This, however, was not such a case. The question involved was, whether R. M. Buck owed the bank the amount of the notes which these parties had given. If he did not, then, on the plaintiff's theory, the consideration for the notes failed. His admission that he did was sufficient evidence of the fact until disproved, but it could conclude no one. Third parties who had made promises on an assumption that the indebtedness existed, were at liberty to show that the admission was founded in mistake, or extorted by fear, or even made corruptly. As it affected them the question was, not whether an admission was made, but whether the fact existed to which the admission had reference.

Evidence was received on behalf of the plaintiffs below, to show R. M. Buck's admission that the lot his mother conveyed to the bank was purchased with money belonging to the bank. This had no relevancy to the present controversy. The fact that the lot was conveyed to the bank in reduction of R. M. Buck's indebtedness, was important, as the fact of any other payment on that indebtedness would be; but what equitable claim the bank might have had to such conveyance was of no concern to these defendants. They were interested to know whether R. M. Buck owed the bank what they had promised to pay for him, but it was immaterial to them on what grounds other persons had seen fit to reduce that amount to its present sum.

The plaintiff below was also permitted to give evidence, in order to raise a presumption that the defense which had been set up was unfounded, that the defendants, or one of them, at a certain interview when interest on the notes was arranged, but before the principal fell due, made no objection to the payment of the notes. We think no such presumption could safely be drawn from this evidence. The notes were negotiable, and if the bank officers should be apprised of an intended defense before they fell due, it

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would be reasonable to expect they would endeavor to protect themselves by negotiating them. The makers of the notes were consequently interested in keeping silent regarding their defense, and it is as legitimate to refer their action to prudence as to any other motive. The evidence, we think, should not have been received. And for the same reason no inference against the *bona fides* of the defense could safely be drawn from the mere fact of the payment of interest by the makers of the notes, before the maturity of the principal. To disclose their defense at that time would have been to defeat it, so far, at least, as concerned the principal.

The most important question in the case arises upon the charge of the court that "if the jury should find, as claimed by the plaintiff, that what the officers of the bank stated to the defendants about prosecuting R. M. Buck was, that in case the notes were signed and the loss of the bank thus partially made up, the officers of the bank would be more likely to sign a petition to the court for clemency in the sentence of R. M. Buck, or any thing of like import, then the jury are instructed that such representations or assurances would constitute no defense to the note." And upon the refusal to charge that "if the jury find that after R. M. Buck was arrested, either with or without process, the plaintiff's agents or attorneys made promises to mitigate any punishment which he might be liable to receive, and the defendants were induced by such promises to give, and on account of such promises did give, the note in question, then the note is invalid."

This charge and refusal to charge present the question directly whether it is legitimate, proper and lawful for private individuals to sign petitions to, or use influence with, a court to induce the court to mitigate the punishment of a convicted criminal, and whether a promise, the motive to make which was the signing of such petition, or the employment of such influence, can be enforced in law.

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The theory of criminal punishment is that it should be graduated to the heinousness of the crime, and so as most effectually to prevent the like offenses in the future. Other considerations are not admissible, and whatever tends to withdraw attention from these, and to cause the penalty to be imposed on other grounds, may be said to be opposed to public policy. Mercy to the criminal is admissible when it may be supposed likely to influence a reformation in himself or his associates, or to have a beneficial effect upon community in general. Whatever the criminal has already suffered in consequence of the crime may properly be considered as a part of his punishment, and may justly be allowed to mitigate the judicial sentence. And if he has made restitution to the party who was the sufferer from the crime, this also may be taken into the account, not only as it may be considered in the nature of a penalty paid, but also because, if voluntarily made, it may be looked upon as some evidence of intended reformation.

In order to properly consider the question as it presents itself in this case, it must be borne in mind that the makers of this note are accused of no crime, and that they were under neither a legal nor a moral obligation to make to the bank any reparation. Their position was only that of persons who were unfortunate in having a relative commit a felony, and whose sympathies were naturally aroused in contemplation of the punishment that was likely to be inflicted upon him. The bank, on the other hand, had been the sufferer from the crime, and its officers naturally were anxious to make up the loss in some manner. And it is alleged that they have made use of this sympathy for the purpose, by promising or holding out inducements that their influence should be employed to mitigate the punishment.

As elements in the consideration for the promise made by the note, the sympathy of the makers and their relationship to the criminal must be left wholly out of view.

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Neither of these separately, nor both together, could constitute a legal support to the promise. Nor, on the theory on which the instructions to the jury were given, can the debt of R. M. Buck be regarded as the sole consideration for the giving of the notes, for the makers of the notes were not connected with that debt, and something besides its mere existence was required to induce them to make any payment upon it. The desire to make whole their loss, was the inducement to the bank to negotiate with these parties, but the desire to shield their relative, is claimed to have been the motive with the defendants below, for any promise made by them. This being so, it would seem to be wholly immaterial to the legal questions involved in this case, whether the loss which the bank had suffered and which the defendants below were desired to make up, was one with which their relative had any thing to do or not. If the bank officers were men of such standing, character and reputation for integrity and sound judgment, that the judge would be likely to attach great importance to their opinions as to the propriety of clemency, and if they should promise to make use of any influence they might have with him, on the relatives of the criminal making good to them some business loss they had suffered, no matter by whom or from what cause, the case in its legal aspects would be the same that it is now. And going a step further, the fact of a loss having occurred will be found of no importance whatever. It was only necessary that the bank officers should give or promise something of value, whether money or other property or services, or submit to some inconvenience, and that the defendants should receive this as the equivalent of their promise to pay. And if the real inducement to the defendants to give the notes was the assurance of the officers that they would sign, or be more likely to sign, a petition for favor to R. M. Buck, then it is obvious that the transaction, stripped of whatever in a legal point of view was immaterial, was simply this: One party was to give a pecuniary consideration, and the equivalent was, that

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another would sign, or promise to sign, or be more likely to sign, a petition for the mitigation of a criminal punishment. It is too plain for argument that such a transaction is not only wanting in the requisites of a legal contract, but that in its tendency it is immoral and pernicious. No actual wrong or thought of wrong is imputed to the parties concerned in this instance; but if the law is as it was laid out at the circuit, then any promise, in consideration that another, supposed to be influential with a judge, would make use of his influence in modifying a criminal punishment, would be a promise which could be enforced in the courts.

It is immaterial that the influence was to be exerted by means of petition. The petition is the proper mode for a constituent to make known to his representative his wants, opinions, or sentiments, or to represent to the appointing power the qualifications or deficiencies of candidates for office, or to give to the executive the reasons for a pardon or reprieve. But a petition, using the word in its ordinary sense, is not a proper means of influencing the action of a court. To present to a court information regarding a convicted person, his former course and conduct, his deportment since the crime, the probable motives leading to its commission, and any facts having legitimate bearing upon the question of his probable reformation, or upon the necessity of punishment for its effect upon others, is not only proper, but the judge himself will take pains to seek such information, and will regret the necessity that may exist in any case of proceeding to sentence without it. And while it is obviously proper that such information should be openly and publicly given in court, in order to guard against the judge being misled by interested statements privately made, yet there is no legal rule which will preclude written information being conveyed to the judge, which he will take such measures to test the accuracy of as the case may seem to him to require. But to hold that petitions to the judge to mitigate a sentence are not only

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proper, but that the getting up and signing such petitions may be a legal consideration for a promise to pay money, is to throw open the administration of justice to an invasion of corrupt motives, and to call around the sessions of courts a similar class of mercenary men to that which now unfortunately is so often found about our legislative halls, seeking to shape the public laws to accomplish private objects.

It is plain that no judge can have confidence in the representations made to him in criminal cases, if it is legitimate for individuals to hire out their services in order to influence his action by private statements made out of court. A rule of law which would permit this must have a direct tendency to make the punishment of offenders depend, not upon the heinousness of their offense, their own depravity, or the probable effect upon the community, but upon the pecuniary ability of the offender or his friends to set at work influences about the judge which shall exaggerate whatever might properly be said in favor of clemency, invent reasons for the purpose where none exist, disparage and defame the prosecutor and the witnesses wherever necessary, and keep from the knowledge of the judge, so far as possible, whatever in the character and history of the criminal would show him a proper subject for severity, and thereby deceive the judge upon the very points on which his information ought to be most full and accurate and obtained from the most impartial and disinterested sources. Such consequences can only be precluded by an inflexible rule of law, that services or assistance of any kind or any description, calculated or intended to influence the action of a court, except in the open and public modes of argument and evidence which the law provides for and allows, can never be a legal consideration for the promise of a pecuniary return.

We do not stop to point out that assistance from pecuniary motives to lighten the punishment of a criminal is

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the same in nature and only different in degree from assistance from the like motives to shield him from punishment entirely. We prefer to put this case entirely upon the tendency such an understanding as the defendants set up, must have to encourage deception of the judge, and to mislead him in the facts upon which his judicial action should be based.

Having referred to the case of petitions to the legislative and executive departments of the government, it may be proper to remark that even as to such petitions, any promise to pay money in consideration of signing the same, or of the employment of solicitations to influence or secure official action in any form whatever, other than by the use of open and legitimate evidence or argument, would be entirely without consideration, because opposed to public policy. This has been so often decided and under such a variety of circumstances, that we content ourselves with a reference to a few of the reported cases.—*Pingry v. Washburn, 1 Aiken, 264; Clippinger v. Hepbaugh, 5 W. & S., 315; Hatzfield v. Gulden, 7 Watts, 152; Fuller v. Dame, 18 Pick., 472; Wood v. McCann, 6 Dana, 366; Marshall v. B. & O. R. R. Co., 16 How., 314; Harris v. Roof, 10 Barb., 489; Frost v. Belmont, 6 Allen, 152; Sedgwick v. Stanton, 14 N. Y., 289; Frankfort v. Winterport, 54 Me., 250; Martin v. Wade, 37 Cal., 168.*

The highest considerations of public policy demand that the pecuniary interests of individuals should not be recognized as legitimate motives to influence the action of official persons, and that in the case of courts most especially, every avenue should be carefully guarded against the intrusion of such motives. Caution is especially required in the case of parties injured by a crime, who apply to avert or mitigate the penalty, because the court would be likely to give exceptional weight to their suggestions, and to assume that their position in relation to the case has led them to inquire fully and particularly into all the facts, and into the pre-

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vious course and character of the criminal, and that as sufferers from the wrong they would not ask clemency unless strong and meritorious reasons existed for granting it.

We are, therefore, all of opinion that the defendants below were entitled to have the jury instructed that if the signatures to the notes were obtained by assurances on the part of the officers of the bank or of any one of them, that if the parties would give the notes, the officers or any of them would sign a petition to the judge for clemency to R. M. Buck in his sentence, or that they would be more likely to do so, or that in any manner they would exercise, or be more likely to exercise influence with the court to secure a lighter sentence, then the promise of the defendants expressed in the notes was based upon a consideration opposed to public policy, and consequently void.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

The People on the relation of The Detroit & Birmingham Plank Road Company v. The Judge of the Wayne Circuit Court.

Appeals from justice's courts: Bond: Affidavit: Defects: Dismissal. Under our statutes (*Comp. L. 1871, §§ 5451, 5455*) an appeal from a justice of the peace can not be dismissed absolutely, for defects and informalities in the affidavit and bond for appeal, where the appellant tenders a new and proper affidavit and bond.

Appeals from justice's courts: Bond: Principal: Sureties. On an appeal taken by a corporation a bond executed by two individual obligors is sufficient, if otherwise in regular form, although one of the obligors is named in the bond as principal instead of surety.

Dismissing appeals from justice's courts for defects in bond and affidavit: Practice in circuit courts. The proper practice on a motion to dismiss an appeal for such defects, is to make an order *nisi* that the appeal be dismissed unless within a time specified a new and correct affidavit and bond be filed.

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DETROIT & BIRMINGHAM PLANK ROAD CO. v. JUDGE OF WAYNE CIRCUIT.

Mandamus: Remedy. *Mandamus* is the proper remedy where an appeal has been improperly dismissed for such defects.

Heard May 13. Decided May 14.

Application for *mandamus.*

The relator instituted proceedings before a justice of the peace against one Daniel Bassett to recover the statutory penalty for forcibly and illegally passing one of the toll-gates on relator's road. The cause was tried by a jury and resulted in a verdict and judgment for defendant. From this judgment the relator appealed to the Wayne circuit court. The affidavit for appeal was made by Edwin F. Conely, but it did not set forth that it was made by him as agent or attorney for the relator, appellant, or that he was such agent or attorney, or in any way authorized to make the same on behalf of the relator. The bond on appeal was executed by George A. Maten, who was named as principal, and by Benjamin Daniels, who was named as surety. In other respects the bond was in usual form.

This appeal was afterwards dismissed absolutely by respondent, on motion of counsel for said defendant, for the defects above stated in the affidavit and bond. On the hearing of this motion the counsel for the relator presented, and asked leave to file, a new and correct affidavit and bond, which the respondent declined to receive.

The relator now applies for a *mandamus* to compel respondent to vacate the order dismissing said appeal, to allow the relator to file such new affidavit, and to pass upon the sureties in such new bond and reinstate said cause.

Maybury & Conely, for the relator.

Theodore Romeyn, for the respondent, argued that *mandamus* was not the proper remedy, and cited, among other cases, *People v. Judges of Branch Circuit, 1 Doug., 319.*

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DETROIT & BIRMINGHAM PLANK ROAD CO. *v.* JUDGE OF WAYNE CIRCUIT.

PER CURIAM.

The dismissal of the appeal was erroneous. Our statutes (*Comp. L. 1871, §§ 5451, 5453*) provide that no appeal shall be dismissed on account of any informality or imperfection in the appeal bond, if the appellant and his sureties consent to amend the same, or if another sufficient bond, to be approved by the court, shall be filed; nor on the ground of a defective affidavit, etc., if the appellant, his agent or attorney, shall make a correct affidavit. Under these statutes leave should have been granted to file the proffered affidavit and bond. Moreover the bond was sufficient as it was. The fact that one of the obligors was named in the bond as principal is immaterial. The statute (*Comp. L. 1871, § 5433*) requires the bond to be executed by the appellant with one or more sufficient sureties, or by two or more sufficient sureties without the appellant. The obligors in this bond both stand in the relation of sureties, and naming one of them as principal could not change this relation.

The proper practice in case of motion to dismiss an appeal for such defects in the affidavit or bond, is to make an order *nisi* that the appeal be dismissed, unless within a time specified a new and correct affidavit or bond be filed.

Mandamus is the proper remedy to correct the error committed in dismissing the appeal.

Writ granted.

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Dominique E. Robert v. The Estate of Emily Morrin, Deceased.

Guardian and ward: Accounts: Notice: Proceedings in probate court. A person who has been under guardianship is bound by notice of the various proceedings and files in the court of probate relating to his estate, and to the transactions of his guardians as manifested in such proceedings; such a person cannot claim that any fact concerning the guardianship accounts has been concealed from him, which he would have known if he had looked in the probate office.

Fraud. Fraud cannot be presumed without proof.

Heard May 13. Decided May 16.

Error to Monroe Circuit.

E. Baldwin, William A. Underwood and *C. A. Stacy*, for plaintiff in error.

Grosvenor & Rauch and *S. T. Douglass*, for defendant in error.

CAMPBELL, J.

Plaintiff sues his mother's estate to recover an amount claimed to have been received by her from the assets of a former guardian and not paid over to him.

Mrs. Morrin's second husband became plaintiff's guardian in 1838, and died in 1848 or 1849. In 1855 Mrs. Morrin, who was his administratrix, rendered her final account. It showed the sum of five hundred sixty-three dollars and forty-eight cents in her hands due to her son, the plaintiff, who was then a minor, but nearly of age. The amount was balanced by giving a note to Samuel Duval, as guardian of plaintiff, for that sum.

Plaintiff came of age in 1856. Duval lived four or five years after the settlement. Mrs. Morrin died in 1867. This note was found more than a year after her death, and plaintiff claims to have found it in the files of the probate court in the estate which she administered.

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The defense rested on the ground of the presumption of payment in fact of the note found among her papers, and also on the ground that the claim even if not paid was outlawed. To this latter defense the answer suggested was, a fraudulent concealment of the cause of action. And it is only on this last question that any errors have been relied on in this court.

As bearing on this, and on plaintiff's means of knowledge, the court charged the jury that, "The probate records and files are public records, and plaintiff must take notice of them after he is of age, and is presumed to know the contents."

It is very evident that the probate records of the estate of plaintiff's first guardian would have informed him of the amount acknowledged to have been in his mother's hands, and furnished him the means of obtaining a knowledge of all that belonged to him from either guardian out of that estate.

We think the charge on this point was proper. Every one must know, or must be presumed to know, that he is interested in fact, as he is a party in law, to the settlement of a guardian's estate, and bound, when he becomes of age, to prosecute his rights with legal diligence. Such proceedings are notice to all persons interested, and it would be in violation of legal policy to allow a person directly affected by them to set up ignorance of what appears there. He is bound to know the law, and what the law requires to enable him to enforce his claims, and within what time he must proceed. The records are open to inspection, and are not like private papers which may be effectually concealed in spite of diligence. There could be no safety whatever in probate proceedings, if, after a lapse of years, a party could throw upon any one else, the burden of showing that he had personal knowledge of their tenor. Where the proceedings of a court are warranted by its obtaining jurisdiction over persons and property to be adjudicated or

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administered, it would be little short of absurd to entertain the suggestion that any one legally bound by the record may preserve rights from outlawry, by failing to inform himself of its contents.

The court also instructed the jury that fraud would not be presumed, and must be proved. This is a proposition too elementary to bear discussion. Counsel in this court argued on the theory that this charge required fraud to be proved more clearly than other necessary grounds of action, and relied on *Watkins v. Wallace, 19 Mich. R., 57*, to show its error. But the court did not here, as in that case, direct the jury that they must have any particular amount of proof. They were only told the fraud must be proved, and it was left to them on the same footing with any other question of fact, to be established by the plaintiff to make out his action.

There was no error in the proceedings, and the judgment must be affirmed, with costs.

The other Justices concurred.

John Woods v. Thomas Love and others.

Mortgages: Foreclosure: Parties. A mortgagee who files a bill of foreclosure is not bound to bring in parties interested in the equity of redemption, unless where he has actual or constructive notice of their claims, and where he has no such notice, they are barred by the foreclosure.

Execution sale: Sheriff's certificate: Notice: Prior mortgagee. A sheriff's certificate of an execution sale is not constructive notice to prior mortgagees, though regularly filed in the register's office; and an execution purchaser cannot, by reason of the filing of such certificate, be authorized to attack a foreclosure in chancery to which he was not made a defendant.

Submitted on briefs May 15. Decided May 16.

Error to Berrien Circuit.

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Edward Bacon, for plaintiff in error.

No counsel appeared for defendants in error.

CAMPBELL, J.

The plaintiff, who holds a deed under an execution sale, brought ejectment against parties holding under a mortgage sale, and judgment was rendered against him.

The mortgage was made in 1856. A bill to foreclose it was filed August 7th, 1860, in the circuit court of the United States for the district of Michigan, and a sale was made under a decree, and a deed was made April 12th, 1861.

Plaintiff claims by an execution sale under a levy made November 22d, 1859, the premises being sold January 14th, 1860, the certificate filed January 24th, 1860, and the sheriff's deed executed April 18th, 1861.

It will be seen that the entire proceedings in foreclosure took place between the execution sale and the expiration of the time when the sheriff could convey.

Plaintiff claims that he is not bound by the foreclosure proceedings, because he was not made a party defendant, and that he is entitled to possession.

As this case was presented by plaintiff in error, *ex parte*, we do not deem it proper to discuss any questions not essential to dispose of the present writ of error.

While, in order to make a complete foreclosure, a mortgagee should bring in subsequent encumbrancers, yet it has not been held that he can be charged with constructive notice, except where such is the clear effect of the registry laws. A party having a priority, of which subsequent purchasers are required to take notice, is not usually concerned with their dealings, and for some purposes is not even bound to consult the records.—*James v. Brown, 11 Mich. R., 25; Cooper v. Bigly, 13 Mich., 463.* And in foreclosure proceedings he is not bound to respect them without actual notice, or valid registry. A paper or entry in the

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register's office is no notice to him unless made so by law. —*Galpin v. Abbott, 6 Mich., 17.* His priority of right can only be affected by a subsequent one clearly protected against his disregard of it.

We have had occasion heretofore, in *Columbia Bank v. Jacobs, 10 Mich. R., 349; Millar v. Babcock, 25 Mich. R., 137; and Campau v. Barnard, 25 Mich. R., 381,* to call attention to the position of execution purchasers as against other persons protected by the registry laws. We have found no statute then in force which makes a certificate on a sheriff's sale notice to affect such a mortgagee at the time of this foreclosure. The finding does not show whether or not any notice of the levy was filed, so that the effect of such a notice is not before us. There was nothing, then, which the complainant in the foreclosure suit could have been legally compelled to act upon, in regard to the execution proceedings, and he was not bound to make the purchaser a party, and the foreclosure was, for any thing appearing in this record, a complete bar to all persons interested in the equity of redemption. The burden of proof was on the plaintiff, and he has shown nothing to invalidate it.

The other important questions suggested by the assignments of error are all rendered immaterial by this fatal defect in the finding, and we need not consider them.

In the absence of any bill of exceptions we have no means of knowing whether the special findings asked for, and some of which are claimed to have been omitted by the judge, were properly requested. Under the facts found they could not have affected the result in any way.

The judgment must be affirmed, with costs.

GRAVES and COOLEY, JJ., concurred.

CHRISTIANCY, CH. J., did not sit in this case.

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Edward Erwin v. Jared S. Lapham.

Subscription: Nominal payee: Payment: Discharge. Where the nominal payee to whom a subscription is payable, is bound absolutely to pay it over to a third person, a payment by the subscriber directly to such third person is valid, and will discharge him from further liability.

Heard and decided May 16.

Error to Wayne Circuit.

Erwin brought suit to recover back money paid by him to Lapham on a subscription, of which the following is a copy:

"For and in consideration of the benefits to be received and enjoyed by us, severally, by the construction and operating of a railroad, substantially on the line of the present Holly, Wayne & Monroe railway, as now surveyed and established, and in consideration of the agreement of the Flint & Pere Marquette railway company to complete the said road as early as January, 1872, and to operate the same, and for other good and valuable considerations, the persons signing this instrument severally promise and agree to pay to William Yerkes, Austin N. Kimmis, John Bassett, the sums set opposite our names, respectively, such payments to be made on demand whenever the said railway shall have the iron track laid down through the township of Novi, and in case such payment is not made when due, as aforesaid, interest at the rate of ten per cent. per annum shall be paid by the person so in default, until payment be made. The money so to be paid shall be used for the purpose of paying the said Flint & Pere Marquette railway company in accordance with the conditions of their agreement above referred to. Dated Novi, September 1st, 1870."

Bassett and Kimmis claiming that such payment was without authority and did not discharge Erwin from liability upon this subscription, and insisting upon payment to them, he brought this suit to test the question.

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The defendant showed that he had received the money collected of plaintiff, as treasurer of the Holly, Wayne & Monroe company, and had paid it over to the Flint & Pere Marquette company. The judgment below was in his favor, and the plaintiff brought error.

Wilkinson & Post and *Ashley Pond*, for plaintiff in error.

C. I. Walker, for defendant in error.

CAMPBELL, J.

We think that when plaintiff paid over his subscription to defendant, and defendant paid it to the company for whose benefit and to whom it was expressly designed to be paid by the subscription, it was a good payment, and would exonerate him from any liability to the nominal payees in the subscription paper. They were to be mere stakeholders, and could not complain that the money did not pass through their hands, since it went where they were bound to pay it.

The judgment below was correct and should be affirmed, with costs.

The other Justices concurred.

Jacob Beller v. Charles Stange and others.

Builder: Contract: Possession. A builder cannot retain possession as against the owner of a building he is constructing under contract with such owner, to enforce payment of the contract price, after the time for performance has expired and he has ceased work, claiming that the building is completed according to the terms of the contract.

Heard and decided April 16.

Error to Wayne Circuit.

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BELLER v. STANGE.

This is an action of trespass brought by Beller against defendants in error, to recover damages for being forcibly kept out of possession of certain premises belonging to him. Defendants in error had contracted with him to construct a building upon said premises, and had ceased work, claiming that the building was completed. The time limited for performance under the contract had expired some five months before. The last payment provided for by the contract had not been made, and the plaintiff refused to pay it, claiming damages for the delay in performance, and that the building was not finished in accordance with the terms of the contract. The defendants, insisting that the delay was caused by plaintiff, and that he was not entitled to the damages claimed therefor, and that the building was completed and said payment due, set up and maintained exclusive possession of the building, and forcibly prevented the plaintiff from entering the same, on the ground that they were entitled so to do under the contract, until such payment was made. The court below charged that the plaintiff was not entitled to recover, and judgment was rendered for defendants. Plaintiff brought error.

Moore & Griffin, for plaintiff in error.

Lyman Cochrane, for defendants in error.

CHRISTIANCY, CH. J.

We see no ground upon which the ruling of the court below can be sustained. The defendants in error had no right of possession as against the plaintiff, under the circumstances disclosed in the record. If any thing remained due upon the contract, the defendants, if they had performed the contract, or were prevented by the plaintiff from performance, had a clear remedy by action upon their contract, or by proceedings under the statute to enforce their

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lien. But we are aware of no law by which they were authorized to hold possession of the property as a means of enforcing their rights.

The judgment must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

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JULY TERM, 1873, AT LANSING.

Frederick W. Carlisle v. The Saginaw Valley & St. Louis Railroad Company.

Railroads: Corporations: Subscription to stock: Statute construed: By-laws: Estoppel. Under the railroad law of 1871 (*Comp. L. 1871, § 2405*) subscriptions to capital stock of a railroad corporation could only be made "in the manner to be provided by its by-laws." A subscription made before any by-laws were adopted gave no rights to either party; and where there had been nothing done to create an estoppel, the subscriber was held not bound by a by-law made afterwards and adopting his subscription.

Heard April 10. Decided July 11.

Error to Saginaw Circuit.

Wisner & Draper, for plaintiff in error.

Gaylord & Hanchett, for defendant in error.

CAMPBELL, J.

Carlisle, the plaintiff in error, is sued as a stockholder for assessments on stock, and defends on two grounds: *first,* that he never became a stockholder; and, *second,* that by an arrangement with another company, the defendant in error made stipulations depriving itself of the power of putting its terminus in East Saginaw, where it was to have been placed by its articles, and so destroying the chief consideration for the subscriptions made in that city.

The agreement in question was made with the Jackson, Lansing & Saginaw railroad, for the use of the track of the latter company from the Tittabawassee river to the East Saginaw depot (which was in Saginaw, and opposite the

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city of East Saginaw), and for the use of the depots in that section. And the clause complained of is a stipulation not to construct or maintain any other track into the city of Saginaw during ten years. It is claimed this precludes the defendant from crossing the river so as to connect with the city of East Saginaw. But by a previous clause in the contract it had been stipulated that defendant might put in the necessary switches and turn the track of the other road "at any point between Farley street and East Saginaw station, for the purpose of crossing Saginaw river." The track to which defendant was to be confined included this proposed crossing as plainly as any other part of the track. The objection therefore is groundless, and we need not consider whether it would have had any effect had it been well founded.

But it is claimed that Carlisle never became a stockholder, because his subscription was not made in the manner authorized by the statute. As the case is presented, there are none of the questions raised which sometimes create estoppels by mutual dealings; and the point to be settled is simply whether his subscription was in such manner as to create the relation of share-holder.

The company was organized after the passage of the law of 1871, which changes the former method of obtaining subscriptions. By the old law, all stock not subscribed in the original articles, must be subscribed by signing the books opened by commissioners, kept in such places, and opened after such notice, as a majority of them should direct, and kept open until all the stock was subscribed. In case more than the whole amount was subscribed they were to equalize the shares.

The law of 1871, instead of continuing this mode of subscription, declares that "the persons who have subscribed such articles, and all other persons who shall, from time to time thereafter, subscribe to or become the holders of the capital stock of said corporation, *in the manner to be provided by its by-laws*, shall be a body corporate," etc.

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The articles of the company were drawn a few days after the law of 1871 was passed, and, in ignorance of the change, named commissioners of subscription; but did not go further in defining their functions. The day after the articles were dated, and the directors organized, they procured blank books for subscription, and gave them to the commissioners named. A majority of the commissioners, without holding a formal meeting, agreed on a form of subscription, and had it copied into each book. The president, who was one of the commissioners, took one of the books to circulate in East Saginaw. No by-laws had been adopted, and none were afterwards adopted until after the plaintiff's subscription was made; but in the interim (and whether before or after he subscribed, does not appear), the directors requested the commissioners to use diligence in causing the balance of the stock to be taken.

On the first of August, 1871, the following by-law was adopted:

"The capital stock of the company, which is not taken and subscribed for on the articles of association, may be subscribed for and taken in shares of one hundred dollars each, in the following form: We, the undersigned, hereby subscribe and take the number of shares of one hundred dollars each, of the capital stock of the Saginaw Valley & St. Louis railroad company, set opposite our respective names, to aid in the construction of said railroad, and we hereby promise to pay to the treasurer of said company the amount of said shares in such assessments and at such times as the board of directors may direct and require; and all subscriptions in the above form which have heretofore or shall be hereafter made by any person or persons, and delivered to the secretary or directors, shall be deemed valid and binding subscriptions to the capital stock of this company."

The form is the one used by the commissioners. A by-law cannot bind any one not already a member of the corporation, and it cannot be claimed that such could have

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been the force of this by-law. If it could have any bearing on past action, it could only be by way of acceptance of some offer not previously binding on any one as a subscription. And it can only operate in the present case, upon the principle that the subscription made before was a standing offer.

No person can obtain rights of membership in a corporation except in compliance with its charter or governing law, and if that prescribes any conditions or special methods of becoming a member, the law is imperative. There may be cases of mutual dealing which will estop both parties, but no contract or subscription can be valid if not conforming to the statute. Sometimes the disposal of unsubscribed stock has been left to the unrestricted discretion of the company, but this has not been done in this state, nor generally. The danger of abuse and unfairness in such disposition is great, and has led to many gross frauds. Uniformity of action has been secured in various ways. Under the former general law all subscriptions were required to be made through commissioners, who had no power of discriminating between parties standing on a similar footing. Requiring all subscriptions to be made under by-laws would serve a similar purpose. And both were undoubtedly designed to prevent any difficulty in determining whether a person was or was not entitled to the rights, and subject to the responsibility, of a subscriber. Few questions have led to more litigation than this, where personal liability is set up, as well as where rights have become valuable. In *Newberry v. Detroit & Lake Superior Iron Co., 17 Mich., 141,* some questions arose illustrating the importance of such regulations.

Where persons subscribe for a future organization, their mutual agreements for a common enterprise may operate as mutual considerations till the enterprise becomes organized, and thereby the common interest is carried into its proposed form. But where the corporation is already in existence, a stock subscription is a transaction between the sub-

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scriber and the company, and the obligation of one can only be sustained by the corresponding obligation of the other. If both are not bound, neither is bound, and the transaction is a nullity.—See *Ang. & A. on Corp.*, §§ *523*, *527*. The doctrine is briefly stated in the latter section as follows: "It seems that the criterion of the liability of a subscriber to stock in a corporation, is whether any act has been done by which *the corporation has been forced to receive the subscriber*." And this is the accepted doctrine everywhere.

An offer may perhaps be made subject to future acceptance, where the charter does not require the subscription to be made otherwise. But where the manner of subscribing is laid down, it is difficult to find room for any other. However this may be, it cannot be maintained that a subscription is to stand as an open offer, unless it was so understood and intended. In the present case such an intention cannot be possible, and is not warranted by the finding. The form of the subscription is a present and absolute agreement, and not a promise or proposal to take stock in the future. It is the same form which the by-law itself adopts for future absolute subscriptions, and will bear no other meaning. It was made supposing the commissioners were acting under the old law whereby their permitting a party to subscribe in their books bound the company. They were all under a mistake, but the intent and understanding of the parties must determine whether they contracted absolutely or conditionally, and there can be no room for doubt on this question.

In *Shurtz v. The Schoolcraft & Three Rivers Railroad Company, 9 Mich. R., 269*, where the irregularity in the subscription consisted in the direct dealings being with the directors instead of commissioners, and where there was a distinct engagement with them through their agent appointed with such authority as they could give him, it was held the subscription was void, because none but the commissioners could receive subscriptions, and that the illegality

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could not be cured by promises to pay. The commissioners could not be compelled to respect any such subscription.

In *Howard's Case, L. R., 1. Ch. Ap., 561,* it was held that where the power of allotting shares was in the directors, they could not delegate that power. In that case a share-holder accepted certain shares conditionally, and the board of directors, instead of assenting to the conditions, resolved that it should be left to the discretion of two of their board and the manager, by whom the stock was allotted to him and his name was placed on the list. But the vice chancellor and the appellate court held, without dissent, that he never was a holder of those shares, and that the action to make him such could only have been taken by the board of directors acting officially.

The principle of those cases governs this. The legislature having seen fit, for satisfactory reasons, to declare that the members of the corporation should consist of the original subscribers, and of such other persons as should subscribe or become holders "in the manner to be provided by its by-laws," it must follow that until by-laws should be enacted, there could be no further subscriptions.

The judgment below must be reversed, and judgment entered for the plaintiff in error on the finding, with costs of all the courts.

The other Justices concurred.

Nahum E. Thomas v. The City of Port Huron.

Constitutional law: Railroad aid: Legislative power. The legislature have no authority to pass statutes authorizing townships or cities to pledge their credit in aid of the construction of a railroad; such legislation is void both upon the fundamental principles underlying the taxing power, and also upon specific provisions of our state constitution.—*People v. Township of Salem, 20 Mich., 452; People v. State Treasurer, 23 Mich., 499.*

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THOMAS v. PORT HURON.

Railroad aid bonds: Municipal corporations. The fact that a city has received in exchange for void bonds issued under such an enabling act, the bonds of the railroad company in whose favor the city bonds were issued, does not make valid the unauthorized obligations of the city. A municipal corporation has no general authority to exchange promises with other corporations or persons; its contract, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes.

Heard April 11. Decided July 11.

Error to St. Clair Circuit.

Chadwick, Stevens & Thomas, for plaintiff in error.

Cyrus Miles and *R. P. & J. B. Eldredge*, for defendant in error.

COOLEY, J.

This suit is upon a bond issued by the city of Port Huron under the provisions of "An act to authorize any of the townships and cities of the counties of St. Clair, Lapeer, Genesee and Shiawassee, to pledge their credit in aid of the construction of a railroad from Port Huron to some point on the line of the Detroit & Milwaukee railroad, in Shiawassee county," approved March 18th, 1865.—*Laws of 1865, p. 547.*

The bond in question, with others, amounting in the aggregate to thirty-seven thousand five hundred dollars, was issued to the Port Huron & Lake Michigan railroad company, in exchange for bonds of the company to an equal amount, and no question is made as to the several provisions of the act regarding the issue of such bonds having been complied with. And we are to consider this case on the concession that no question is involved but that of the liability of the city issuing such bonds under the legislation referred to, and in accordance therewith.

The constitutional power of the legislature to pass enabling acts like the one in question was so fully considered in *People v. Township Board of Salem, 20 Mich., 452,* and *People v. State Treasurer, 23 Mich., 499,* that any further

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discussion would seem superfluous. We have held in those cases that on the fundamental principles underlying the taxing power, and also upon specific provision of the state constitution, such legislation is void.

When this case was presented, we were all of opinion that the two previous cases must rule this, and that it presented no new features which could distinguish it. But as it was strongly pressed upon us that the fact of the city having received the bonds of the railroad company in exchange for its own, furnished a legal consideration which would support its undertaking, we have allowed the case to lie over to this time for more mature reflection.

Further consideration, however, does not enable us to reach this conclusion. Putting aside as unauthorized the enabling act in question, it will not be pretended that the city had any authority whatever for issuing these bonds. And the only point presented for decision is, whether, when a municipal corporation issues its obligations without authority of law, the fact that it receives in exchange therefor the obligations of the party to whom they are issued can make valid the unauthorized obligations of the city.

It is not claimed that the city has ever received from the railroad company any payment upon the bonds of the latter, either by way of principal or of interest.

If it had, we should agree with counsel that it could not retain such payments and at the same time refuse to pay its own bonds. But we do not concede that such payments could afford a support for the bonds thus illegally issued; the case, on the other hand, would be one of money received without consideration, and which the party equitably entitled might recover in the proper legal or equitable proceeding. What that proceeding should be, or who should institute it, we need not undertake to indicate; the parties concerned would probably not be at a loss to determine for themselves, when the facts should warrant suit. But the case now is simply this: The city officers have received and now hold bonds of the railroad company which

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the city has no authority to retain and collect, and other parties, including the plaintiff in this suit, have paid moneys to the railroad company for its benefit, and for the ultimate repayment of which by the railroad company as principal debtor, these railroad bonds were to be security. The intermediate security which the city was to give, and in respect to which its position as regards the railroad company would be that of surety merely, proves to have been illegal and therefore fails, but as regards the ultimate security no question of legality or validity is raised; and under such circumstances the claim that the city should pay its own unauthorized bonds, because the railroad bonds still remain with the city treasurer, but not in any manner used or enforced, does not seem to us warranted by law. A municipal corporation has no general authority to exchange promises with other corporations or persons; its contracts, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes. And if, under pretense of law, its officers in its name obtain money, property, or rights in action which equitably belong to another, the fact may entitle the party to a proper remedy, but it cannot make good these bonds, unless it is to be held that the power of municipal corporations to make legal promises is co-extensive with that of individuals, and that any contracts they may make are valid where it can be said that any thing of value was given or inconvenience submitted to in exchange. The position assumed by the plaintiff in this case inevitably leads to this result.

Our conclusion is, that there is no error in the record, and the judgment will be affirmed, with costs.

CAMPBELL, J., and CHRISTIANCY, Ch. J., concurred.

GRAVES, J.

I agree that this case is ruled by the views declared by the majority of the court in the Salem and Bay City cases, and should therefore be affirmed.

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Henry Lingham and another v. Chauncey Eggleston, Jr.

Sales: Title: Intent. The question whether a sale is completed, or only executory, where no question arises under the statute of frauds and the rights of creditors do not intervene, is one to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold, and the circumstances surrounding the sale.

Sales: Delivery: Title: Price: Measurement: Intent. Where the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined; these are circumstances indicating intent, but are not conclusive.

Sales: Price: Quantity and quality: Presumption: Condition precedent. But where any thing is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of these things, in the absence of any thing indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they may and ought to be accepted.

Sales: Lumber: Inspection: Title: Transfer: Presumption. In this case, which involved the question of the sale of certain lumber specifically designated, but not actually delivered, under a contract making the price to depend upon an inspection and separation of qualities and measurement of quantities to be thereafter made, it was held that something of importance remained to be done by the vendor to ascertain the price to be paid, and that this was, in the absence of any thing showing a contrary intent, presumptively a condition precedent to the transference of title.

Heard April 17 and 18. Decided July 11.

Error to Genesee Circuit.

Edward J. Bissell and *F. A. Baker*, for plaintiffs in error.

Oscar Adams and *L. Walker*, for defendant in error.

COOLEY, J.

The contest in this case relates to a sale of lumber by Eggleston to Lingham and Osborne, and the question involved is, whether the contract between the parties amounted to a sale *in presenti* and passed the title, or merely to an executory contract of sale. The lumber, subsequent to the contract and before actual delivery to the

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purchasers, was accidentally destroyed by fire, and the purchasers now refuse to pay for it, on the ground that it never became their property. The action was brought by Eggleston for goods bargained and sold, and in the court below he recovered judgment.

There appears to be very little dispute about the facts. The lumber was piled in Eggleston's mill yard at Birch Run. In September, 1871, he sold his mill to a Mr. Thayer, reserving the right to leave the lumber in the yard until he disposed of it. To most of the lumber the plaintiff had an exclusive title; but there were four or five piles which he owned jointly with one Robinson. The whole amount was from 200,000 to 250,000, excluding Robinson's share in the four or five piles. The defendants went to the mill yard September 23d, 1871, and proposed to buy the lumber. Plaintiff went through the yard with them, pointed out the several piles, and designated those in which Robinson had an undivided interest, and also some piles of shingles which they proposed to take with the lumber. After examining the whole to their satisfaction, the defendants agreed upon a purchase, and the following written contract was entered into:

"Flint, September 23d, 1871. Lingham and Osborne bought from C. Eggleston this day, all the pine lumber on his yard at Birch Run at the following prices: For all common, eleven dollars, and to include all better at the same price; and for all culls, five dollars and fifty cents per M., to be paid for as follows: Five hundred dollars today, and five hundred dollars on the 10th of October next; the balance, one-half on 1st day of January, A. D. 1872, and the rest on the first day of February following; said lumber to be delivered by said Eggleston on board of cars when requested by said Lingham and Osborne, which shall not be later than 10th of November next. Also some shingles at two dollars per M. for No. 2 and four dollars for No. 1.

(Signed) "LINGHAM & OSBORNE.
CHAUNCEY EGGLESTON, JR."

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The five hundred dollars mentioned in this contract to be paid at the time of its execution was paid. A few days later defendants went to the mill yard in plaintiff's absence and loaded two cars with the lumber. He returned before they had taken them away, and helped them count the pieces on the cars, but left them to measure them afterwards. At this time the lumber in the piles had not been assorted, inspected or measured. There was disagreement between the parties as to whether they had fixed upon a person to inspect the lumber; the defendants claiming that such was the fact. On the ninth day of October, 1871, Lingham met plaintiff on the cars at Flint, and told him the fires were raging near Birch Run; that the lumber yard was safe yet, but that there were eight cars standing on the side track, and he had better go up to Birch Run and load what were there, and get what lumber he could away; plaintiff took the first train for the purpose, and while on the train the train boy gave him the following note from Lingham:

"Holly. Mr. Eggleston: You may load, say ten thousand, if you think best, on each car, and we can have it inspected as it is unloaded. I will try and come up tomorrow.

When plaintiff reached Birch Run the fire was raging all about the mill, and that, with all the lumber in the yard, was soon totally destroyed by fire. Such are the undisputed facts in the case; and upon these the jury were instructed in substance that a completed contract of sale was made out, and the plaintiff was entitled to recover the purchase price.

Where no question arises under the statute of frauds, and the rights of creditors do not intervene, the question whether a sale is completed or only executory, must usually be determined upon the intent of the parties to be ascertained from their contract, the situation of the thing sold, and the circumstances surrounding the sale. The parties

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may settle this by the express words of their contract, but if they fail to do so, we must determine from their acts whether the sale is complete. If the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined. All these are circumstances having an important bearing when we are seeking to arrive at the intention of the parties, but no one of them, nor all combined, are conclusive.

In *Blackburn on Sales, 120,* the rule on this subject is very clearly and correctly stated as follows: The question, the author says, is "a question depending upon the construction of the agreement; for the law professes to carry into effect the intention of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement; not before. In this, as in other cases, the parties are apt to express their intentions obscurely; very often because the circumstances rendering the point of importance are not present to their minds, so that they really had no intention to express. The consequence is, that without absolutely losing sight of the fundamental point to be ascertained, the courts have adopted certain rules of construction which, in their nature, are more or less technical. Some of them seem very well fitted to aid the court in discovering the intention of the parties; the substantial sense of others may be questioned. The parties do not contemplate a bargain and sale till the specific goods on which their contract is to attach are agreed upon. Where the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale of the goods, unless there be something to indicate an intention to postpone the transference of the property till the fulfillment of any conditions; and when by the agreement the seller is to do any thing to the goods for the purpose of putting them into a deliverable shape, or when any thing is

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to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transfer of the property. But as these are only rules for the construction of the agreement, they must yield to any thing in the agreement which clearly shows a contrary intention. The parties may lawfully agree to an immediate transference of the property in the goods, although the seller is to do many things to them before they are to be delivered; and, on the other hand, they may agree to postpone the vesting of the property till after the fulfillment of any conditions they please." In *Benjamin on Sales, 214, 215,* the same doctrine is laid down, and it is said that "nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn in bulk, sold at a certain price per pound or per bushel." And see *Ib., 221, et seq.*

Upon this general principle there is no difficulty in reconciling most of the reported decisions. And even without express words to that effect, a contract has often been held to be a completed sale, where many circumstances were wanting and many things to be done by one or both the parties to fix conclusively the sum to be paid or to determine some other fact material to their respective rights.

The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong if not conclusive evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards. A striking case in illustration is that of *Young v. Mathews, Law R., 2 Exch., 127,* where a large quantity of bricks was purchased in kilns. Only a part of

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them were burned, and none of them were counted out from the rest; but they were paid for, and such delivery as in the nature of the case was practicable was made. The court held that the question was one of intention merely, and that it was evident the parties intended the title to pass. To the same effect are *Woods v. Russell, 5 B. & Ald., 942; Riddle v. Varnum, 20 Pick., 280; Bates v. Conklin, 10 Wend., 389; Olyphant v. Baker, 5 Denio, 379; Bogy v. Rhodes, 4 Greene (Iowa), 133; Crofoot v. Bennett, 2 N. Y., 258; Cunningham v. Ashbrook, 20 Mo., 553.*

So, if the goods are specified, and all that was to be done by the vendor in respect thereto has been done, the title may pass, though the quantity and quality, and consequently the price to be paid, are still to be determined by the vendee.—*Turley v. Bates, 2 H. & C., 200; Kohl v. Lindley, 39 Ill., 195.*

And even if something is to be done by the vendor, but only when directed by the vendee, and for his convenience, as, for instance, to load the goods upon a vessel for transportation, the property may pass by the contract of sale notwithstanding.—*Whitcomb v. Whitney, 24 Mich., 486; Terry v. Wheeler, 25 N. Y., 520.*

But the authorities are too numerous and too uniform to justify citation, which hold that where any thing is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods; the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they may and ought to be accepted.

A learned author from whom we have already quoted, says of this, that "the rule seems to be somewhat hastily adopted from the civil law, without adverting to the great

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distinction made by the civilians between a sale for a certain price in money, and an exchange for any thing else. The English law makes no such distinction, but, as it seems, has adopted the rule of the civil law, which seems to have no foundation except in the distinction. In general the weighing, etc., must, in the nature of things, be intended to be done before the buyer takes possession of the goods; but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided they be of value." But the same writer, with candor and justice, adds, that this rule is now "firmly established as English law."—*Blackburn on Sales, 153.* And see *Turley v. Bates, 2 H. & C., 200,* in which this passage is quoted and the conclusion treated as unquestionable.

What then are the facts in this case from which the intent of the parties is to be inferred? The lumber was specifically designated, so that no question of identity could arise. It was not delivered, and the vendor was to place it on board the cars, if desired to do so within a time specified; but as in any event the vendees were to take it at Birch Run, and it was optional with them to load it on the cars themselves or to have the vendor do it for them, and they had no right to require that he should do so after the day named, we think the circumstance that actual delivery was not made is not one of very much importance

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in the present discussion. What is of more importance is, that neither the quality nor the quantity was determined; and the evidence in the case shows that as to these there might very well be, and actually were, great differences of opinion. The price to be paid was consequently not ascertained, and could not be until the qualities were separated and measurement had.

It will be observed that the contract did not provide how or by whom the inspection and measurement should be made. It was certainly not the right of either party to bind the other party by an inspection and measurement of his own; it was the right of both to participate, and we must suppose such was the intent, unless something clearly appears in the case to show the contrary. Nothing of that nature appears in the record except the disputed evidence of defendants, that a person was agreed upon for the purpose. The note sent by Lingham to Eggleston proposing that the eight cars be loaded and that the vendees make the proper inspection, was a mere proposition, and never acted upon. It is very evident Eggleston was under no obligation to trust this important transaction exclusively to the vendees, and we have no right to infer that he would have done so. It follows that something of high importance remained to be done by the vendor to ascertain the price to be paid; and as this, under all the authorities, was presumptively a condition precedent to the transference of the title—nothing to the contrary appearing—the court should have so instructed the jury. The instructions given were in substance directly to the contrary.

It follows that the judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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Mary P. Barnum, Administratrix, etc. v. William H. Stone and another.

Money had and received: Evidence: Conversion: Remedy. Evidence that defendant has come lawfully into the possession of government bonds, as a gratuitous bailee for plaintiff's intestate, and has delivered the same over without receiving any thing therefor, to a third person who claimed title thereto, will not support a count by the administratrix for money had and received to her use. The appropriate remedy is either trover, or a special action on the case for violation of duty as agents or bailees.

Practice in supreme court. Where, upon the whole case, it appears that the plaintiff is not entitled to recover, the judgment against him will not be disturbed for errors in the rulings of the trial court.

Declaration: Money had and received: Evidence: Administrators. Under a declaration in assumpsit for money had and received, which describes the plaintiff as administratrix, etc., but sets forth an indebtedness and promise to the plaintiff only, precisely as if she were suing in her individual character, it seems that no recovery can be had for money received to the use of the decedent during his life-time.—Per GRAVES, J.

Heard April 18. Decided July 11.

Error to Lenawee Circuit.

A. L. Millard, for plaintiff in error.

Eldredge & Walker and *A. Howell*, for defendant in error.

GRAVES, J.

The plaintiff in error having prosecuted unsuccessfully as plaintiff in the court below, has brought her case here on writ of error and bill of exceptions, and she asks a reversal of the judgment against her, upon several grounds stated in the record.

Whatever opinion may be formed of the merits of particular objections, and among them, the objection to the ruling touching the challenge of the juror, it is certain that the judgment below ought not to be disturbed if it appears upon the whole case that the plaintiff was not entitled to recover. And an examination has led to the conclusion that she was not, and that the result reached in the circuit court was such as the law required.

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The plaintiff's intestate, Royal Barnum, died on the fifth of February, 1866, and this suit was commenced a few days less than six years afterwards. The action was assumpsit, and was commenced by declaration, which contained only the common counts.

It began as follows: "Mary P. Barnum, administratrix upon the estate of Royal Barnum, deceased, plaintiff in this suit, by Geddes & Miller, her attorneys, comes and files this declaration as commencement of suit and complains of William H. Stone and Langford G. Berry, defendants herein, of a plea of trespass on the case upon promises: for that whereas the defendants on the 22d day of January, 1872, were indebted to the plaintiff in the sum of ten thousand dollars," etc.

The counts were in the usual brief form, and the conclusion was in the following terms: "And whereas the said defendants afterwards, and on the day and year aforesaid, in consideration of the promises respectively, there promised the plaintiff to pay the said several sums of money respectively, on request; yet the said defendants have disregarded their said premises and undertakings and have not paid any of the said sums of money above demanded, or any part thereof; to the plaintiff's damage of ten thousand dollars, and therefore she brings suit," etc.

There was no allegation of an indebtedness or promise to Mrs. Barnum in her character of administratrix, neither was there any count upon an indebtedness and promise to the intestate. Aside from the terms of addition in the commencement, there was nothing in the declaration to indicate that Mrs. Barnum held the office of administratrix, or was prosecuting in any other than her individual character.

The addition in the commencement merely sufficed to describe the plaintiff, and in no manner served to affect the substance of the pleading or the essential rights of the parties. The declaration legally imported an action prosecuted in her individual character, and the several counts

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were to be construed as alleging causes of action which had accrued to her in such character.—*Merritt v. Seaman, 2 Selden, 168, and authorities cited; Barnes v. Modisett, 3 Blackf., 253.*

No recovery was sought except upon the count for money had and received, and all the evidence for the plaintiff was adduced to support that count. Now it was competent for Mrs. Barnum to sue, either in her individual or in her representative character, for money had and received after the death of the intestate for the use of the estate, but in order to recover for money received in the life-time of the intestate she was required to sue in her representative character, and to allege that it was received to the use of the intestate.—*Mowry v. Adams, 14 Mass., 327; Pennell v. Aston, 14 M. & W., 415; Fry v. Evans, 8 Wend., 530; Merritt v. Seaman, before cited.*

As a consequence, then, of the character ascribed to the cause of action by the declaration, the plaintiff was required to show in order to recover, that the defendants, subsequent to her husband's death, received money to her use; but no evidence tending to prove any thing of that kind was offered in support of the action. The whole evidence as to the receipt by the defendants of any money in controversy, related to transactions between the defendants and the intestate; and even the bill of particulars furnished by the plaintiff, confined the claim for money had and received, to items deposited by the intestate with defendants.

Upon this state of things I think the plaintiff was not entitled to a verdict, and ought not to prevail on this writ of error. But passing this view, which is presented as my own only, the case may be considered on another ground, which the court deem decisive against the plaintiff. The substantial subject of dispute as indicated by the course of the evidence and the controversies of counsel, appears to have been the government bonds purchased by the defendants and handed over by them to the insurance company. These bonds were bought just before Mr. Barnum's death,

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and were delivered over to the company just after that event. There is no question whatever but that they were bought by direction of Mr. Barnum, and against credits standing nominally in his name at the defendants' bank. Neither is there any question but that they went rightly into the hands of the defendants when sent from Chicago.

It is entirely clear that they were obtained as something other and in the place of cash, and went into defendants' custody with Mr. Barnum's sanction. Their reception and possession, then, when the defendants got them, afforded no ground of action. If any actionable grievance arose, it must have been something subsequent and different. The insurance company claimed the bonds as their property, and the defendants, believing the claim to be well founded, simply handed them over to the company, and soon afterwards informed the plaintiff. The defendants neither negotiated the bonds nor used them in any way. The title to them was unchanged. The actual custody was shifted to the company on their claim of ownership. The plaintiff now insists that the bonds belonged to the estate, and that defendants are liable for their value as for money had and received to her use. Admitting that the bonds belonged to the estate when they were handed to the insurance company, and that defendants were not warranted in handing them over, will the facts support a count for money had and received to the plaintiff's use?

To allow a recovery in that form upon such a state of facts would, it seems to me, result in confounding all recognized distinctions. The defendants, upon the assumed facts, were liable in damages for the conversion of the bonds, or for violation of duty as agents or bailees. There was nothing however on which to base assumpsit for money had and received to the use of the plaintiff.—*Hatten v. Robinson, 4 Blackf., 479.*

The defendants neither transferred nor assumed to transfer any title or interest. They neither obtained nor bargained for any gain or advantage. They neither exercised

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nor pretended to exercise any proprietary right or authority in or over the papers. They simply yielded to the claim of ownership asserted by the insurance company, and allowed that company to assume the custody; and it is argued, in substance and effect, though not in terms, that this fact, which prevented a delivery to the plaintiff on request, amounted to a conversion which may be waived, while the transaction will still suffice to support this form of action for the value of the bonds. But this reasoning I think conveys its own refutation. The action for money had and received, upon this theory of waiving the acts of misfeasance, impliedly adopts these acts and affirms the handing over of the bonds, and imputes to the defendants, as a consequence of such acts, the receipt of the value of the papers, and then bases the assumpsit or promise on the supposed receipt of such value.—*Lamine v. Dorrell, 2 Lord Ray., 1216.* Now if the action is to be taken as affirming the passing of the bonds to the insurance company, no basis of fact is left to support it. Upon that construction the handing over of the bonds is made to be the act of the plaintiff, and as it was barren of any pecuniary results to the defendants, there was no ulterior consequence to give rise to the alleged assumpsit. The actual facts leave no room for fictions or presumptions.

When considered in its real character, the case resolves itself into a complaint against defendants as gratuitous bailees of the bonds in question, in order, *first*, to try the title to them, as between the insurance company and the estate, and in the event of making out title to them in the estate, then, *second*, to found a right of recovery for their value against the defendants, upon their misconduct as bailees in shifting the custody of the bonds to the company. Upon the conceded circumstances the action for money had and received was not the appropriate remedy.

The true state of facts as to the change of possession from the defendants to the insurance company, was never from the first in dispute or doubt, and whatever right of

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action resulted, whether in trover or a special action on the case, it was one for damages grounded on the improper conduct of the defendants as bailees of the specific securities. Some of the admitted circumstances are inconsistent with the action for money had and received, and some which are wanting would be essential to it.—*Parry v. Roberts, 3 A. & E., 118; Chauncy v. Yeaton, 1 N. H., 151, 155; Whitwell v. Vincent, 4 Pick., 449; Shepard v. Palmer, 6 Conn., 95.*

There are further grounds of objection to a recovery, but it is not needful to examine them. I think the judgment should be affirmed, with costs.

The other Justices concurred.

Peter Roberts v. Moses W. Field.

Bounty: Resolutions construed. The resolutions of the common council of Detroit, of October 1st, 1864, providing for the payment of three hundred dollars bounty to each person who, since September 21st, 1864, had been, or thereafter should be enlisted and credited to any ward in the city, were not intended for the benefit of the wards of the city, but of the individual enlisting, and this bounty is in addition to the amount of ward bounty any ward had undertaken to pay; a contract with any ward, therefore, to fill its quota, would give the contractor no title to the city bounty provided by such resolution to be paid to one who had enlisted and been credited to such ward.

Evidence: Contract. Evidence on cross-examination of the plaintiff, that he did not know that defendant had obligated himself to fill the ward, and that defendant did not tell plaintiff so, but that defendant had made such a statement in the newspapers in his own defense, is not sufficient proof, standing alone, of the existence of such a contract, to authorize the defendant to rely upon it as a defense.

Resolutions construed: Bounty: Furnishing enlisted men. The resolutions aforesaid, when considered together and in the light of the existing legislation (which is referred to in the preamble) and of the surrounding circumstances, cannot be held to have intended to provide the bounty for the benefit of those only who should furnish persons to enlist, so as to preclude the enlisted man from claiming it where he had enlisted of his own free will and had not been "furnished" by any other person.

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ROBERTS v. FIELD.

One enlisting of his own motion and without the solicitation of another, may well be said to have "furnished" himself, within the meaning of said resolutions.

Bounty: Assignment: Evidence. The assignment of the certificate of enlistment and the bounty to be paid thereon, in this case, was held not to be conclusive between the parties, but to be open to explanation by oral evidence like a mere receipt.

Charge to the jury. No evidence having been given tending to show any defense to the plaintiff's claim, the jury should have been instructed that if they believed the plaintiff's evidence (which was wholly uncontradicted), they should find a verdict in his favor.

Heard April 23. Decided July 11.

Error to Wayne Circuit.

Trowbridge & Atkinson, for plaintiff in error.

D. C. Holbrook and *G. V. N. Lothrop*, for defendant in error.

CHRISTIANCY, CH. J.

This was an action of assumpsit brought by Roberts against Field in the Wayne circuit, to recover two hundred and fifty dollars, part of a soldiers' bounty of three hundred dollars allowed by the city of Detroit to persons who enlisted in the army of the United States after the 21st of September, 1864, and were credited to any ward in the city. No question arises upon the declaration, which is sufficient, if the facts which the evidence tended to show were sufficient to maintain an action.

The evidence tended to show the following state of facts:

On the 26th day of September, 1864, when the plaintiff enlisted, the only bounty payable by the city to men who should then enlist was fifty dollars. But the fourth ward of the city had undertaken to pay a ward bounty to those who should enlist and be credited to that ward, of three hundred and fifty dollars; and Field was acting as the agent of that ward in procuring enlistments and filling their quota.

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ROBERTS v. FIELD.

Plaintiff, on the morning of the 26th of September, having, without any solicitation of Field, and without having seen him on the subject, made up his mind to enlist in the 24th Michigan infantry; and wishing to be credited to the 4th ward and to obtain the ward bounty allowed by that ward, called at the office of Field, and told him that he wished so to enlist and be credited. Field told him Capt. Dillon was enlisting men for the 24th, and he didn't know that he could have him down there until the afternoon, but said he (Field) could enlist him in something else; but if he would come in the afternoon, he would have Capt. Dillon there, who could enlist him in the 24th. Roberts went away and returned in the afternoon and found Capt. Dillon there, and Roberts then enlisted, in the office of Field, and was credited to the 4th ward. Field then said to Roberts: "I might as well pay you the city bounty (as I am in that line of business) and it will save you the trouble of collecting it;" to which Roberts assented, and Field called him one side, and Roberts then signed a paper which he supposed to be a receipt or certificate for the fifty dollars. Roberts understood and received this as a favor or advance of Field, and a convenience to Roberts, with no intentions of giving any other rights. The paper thus signed would seem to have been a printed form on the back, or at the foot, of the certificate of enlistment, and was in the following form: "For value received, I (or we) hereby transfer and assign to Moses W. Field, or bearer, all my right, title and interest of, in and to, the annexed certificate and the bounty to be paid for my enlistment by the city of Detroit, and all other local bounties; and I hereby direct and order that the said bounties, or bonds, or warrants therefor, be issued and delivered to said Moses W. Field, or bearer, to his own use forever.

(Signed) "PETER ROBERTS.

"In presence of R. S. DILLON."

Roberts admits the payment to him of the fifty dollars city bounty allowed at the time of this enlistment, and of

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the three hundred and fifty dollars ward bounty from the 4th ward, which his brother got of Field after Roberts had gone to the front and sent up a certificate from the adjutant that he had arrived there.

But on the 1st day of October, 1864, the common council of the city, in accordance with the resolutions and recommendations of a citizens' meeting that day held, adopted a resolution giving one hundred dollars in cash and two hundred dollars in bonds of the city (making three hundred dollars) to each person who, since the 21st day of September, 1864, had been, or should therefrom be, enlisted and credited to any ward in the city. This three hundred dollars, however, seems to have been intended, so far as we can judge from the record, to include the fifty dollars previously allowed. The plaintiff, Roberts, came within this resolution; and Field, on or about the 10th day of October, 1864, on presentation of the instrument signed by Roberts, a copy of which is above given, obtained from the city one hundred dollars in cash and a city bond of two hundred dollars, which he has since negotiated and upon which he received the money. Roberts having heard of this additional bounty, wrote in October, from the front near Petersburg, to his brother in Detroit to call on Mr. Field and obtain from him the two hundred and fifty dollars balance of the city bounty still due him. The brother, calling upon Field for that purpose, was told by the latter that the plaintiff had assigned that two hundred and fifty dollars to him; and he therefore declined to pay it.

Some time in the early part of the winter of 1865, plaintiff having a furlough to attend a court martial at Jackson, came up from Petersburg and called upon Field, at Detroit, for the balance of the city bounty due him, which Field had collected of the city. Field denied owing him this two hundred and fifty dollars; admitted he had collected it of the city; but claimed it under the paper or assignment above stated, which had been signed by plaintiff; telling him (plaintiff) that he (Field) had taken the risk

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of losing it; that it was a fair business transaction, and that he would not pay him any more.

This evidence has in no way been contradicted or controverted; and Field, who was himself sworn as a witness, does not even intimate that it is not true in every particular. But he insists that he had a right to keep the two hundred and fifty dollars, and claims that it was a fair business transaction.

The ground upon which his counsel have undertaken to base this claim, so far as we can comprehend from the brief and arguments in the case, are:

1st. That Field had taken a contract and obligated himself to fill the quota of the 4th ward under the pending call of the President for 500,000 men, and that the ward contributing the bounty of three hundred and fifty dollars per man, he, Field, was bound, at his own risk, to procure the men and fill the quota; and, though not expressly asserted by the counsel, the idea is shadowed forth and is logically involved in the argument and absolutely necessary to make such a supposed contract any ground for retaining the two hundred and fifty dollars, that, as a part of the arrangement or contract with the ward, he was to be allowed any city bounty which the common council might see fit to allow to, or for, men thus enlisting;

2d. That the resolution of the council, of October 1st, giving the three hundred dollars bounty, gave it, not to the enlisted man or for his benefit, but to the person who should furnish the man; and,

3d. That Roberts enlisted and was credited to the 4th ward under this arrangement, and is therefore to be considered as "furnished" by Field, within the meaning of this resolution.

As to the first point, it is sufficient to say, that there is no evidence in the case tending to show any such contract, or any contract on the part of Field, or that he had become bound in any way to fill the quota of the ward. The fact, if it existed, was one which it devolved upon

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him to prove. He was himself sworn as a witness, and does not even intimate that any such contract was ever made. All that is said upon the point is by Roberts himself, upon his cross-examination, who, when asked if he did not, at the time of his enlistment, know that Field had obligated himself to fill the ward, says he did not, nor did Field tell him so; but that Field had said so in the papers lately in his defense. And upon this the counsel see fit to rely in their argument, as proof of such a contract.

But if he had made a contract with the ward to fill its quota, this could give him no right to any part of the city bounty of three hundred dollars, unless it was further shown, not only that the ward had contracted that he should have the benefit of any city bounty that might be given on account of the men enlisted and credited to that ward, but that the city, by its common council, had granted this bounty for the relief of the respective *wards*, instead of that of the enlisted *men;* so that, though the ward gave a bounty of three hundred and fifty dollars per man, three hundred dollars was paid by the city, leaving only fifty dollars to be finally met by the ward. Then, by showing he had paid the whole ward bounty himself, or, if first paid by the ward, that he had paid over to the ward this two hundred and fifty dollars, he would have made a good defense.

If such, however, had been the contract, and such the effect of the resolution of the council, why should Field have paid Roberts the fifty dollars? No reason can be suggested entitling Field to the two hundred and fifty dollars of the city bounty which would not equally have entitled him to retain the fifty dollars which he paid over. Nor, in fact, upon the theory he now sets up, does it satisfactorily appear why he had not just as good a right to retain the three hundred and fifty dollars ward bounty, which was as clearly covered by Roberts' assignment as the city bounty. But the resolution of the common council will bear no such construction. There is nothing in it showing that it was intended to relieve any ward in the

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city, from paying such ward bounty as it had undertaken to pay. In other words, the resolution shows the intention to pay three hundred dollars per man bounty, without reference, and therefore clearly in addition to, the amount of ward bounty which any ward had undertaken to pay.

The second ground relied upon by the defendant is equally baseless, viz: "That the resolution of the council giving three hundred dollars was intended for the benefit of *those persons only* who should *furnish* persons to enlist, and not for that of the enlisted men."

Some portion of the first resolution may not, upon the first view, seem entirely clear, but when all are read together and carefully considered, the meaning is clear enough.

They read as follows: "*Whereas*, at a meeting of the freemen and electors of the city of Detroit, held in the City Hall in said city, upon the first day of October, 1864, in pursuance of the proclamation of the mayor, and *in accordance with law*, it was voted to raise one hundred and fifty thousand dollars by loan upon the bonds and credit of the city, in order to pay a city bounty of one hundred dollars to each person who, since the 21st of September, 1864, has been, or shall hereafter be, mustered into the military or naval service of the United States, and who shall be credited upon the quota of any ward in the city, under the present call of the President for five hundred thousand men, and also to issue to such persons so mustered, and credited, the bonds of the city, in an additional sum of not to exceed two hundred ($200) dollars, to each such person, therefore, *Resolved*, That his honor the mayor, the chairman of the committee on ways and means, and the controller, be and are hereby directed to have executed, issued and negotiated, from time to time, so much of said first mentioned bonds as shall be necessary to raise sufficient money to pay such sums of one hundred dollars each to such person or persons as shall furnish satisfactory evidence that he or they have furnished a person who has, since the date aforesaid, been,

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or who hereafter shall be as aforesaid, mustered and credited, and also to issue to such person or persons as shall furnish satisfactory evidence that he or they have furnished a person, who has, since the date aforesaid, or who shall hereafter be, so mustered and credited, bonds of the city, not to exceed two hundred dollars for each person so mustered and credited, from time to time, as may be necessary.

"*Resolved*, That the controller be and is instructed to keep an account, showing the amount of bounties in cash or bonds, so paid *to persons credited* to each of the several wards of the city.

"*Resolved*, That no bounty in cash or bonds be paid or issued *to any person to be credited, or who is credited* to any ward, the quota of which shall be known to the controller to be full, at the time such person was mustered.

"*Resolved*, That the mayor, the chairman of the committee of ways and means, and the controller, are hereby empowered to fix the form of all the bonds so to be issued, and the respective times of the maturity thereof."

Now, it will be noticed, that by the preamble it clearly appears that these resolutions were intended to be based upon the authority of a vote of the electors of the city, held on the first of October, 1864, in pursuance of a proclamation of the mayor, "and in accordance with law." And it appears also, by the proceedings of the citizens' meeting, given in the record, that the resolution submitted to the meeting to be voted upon, was a resolution adopted by the council on the 20th of September. The law referred to as the authority for the meeting and vote of the electors, would seem to have been the act of February 5th, 1864 (*Laws of 1864, pp. 53 to 59*), which act seems to have been followed, except as to the amount of the bounty voted, that act only authorizing two hundred dollars. But, for the authority to raise the three hundred dollars, reliance was doubtless had upon some future legislation; and the act of the next session ratified such action.—See *Laws of 1865, pp. 140 to 145.*

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Now the first mentioned act only authorized the raising of money to pay *bounties*, as such, to *the person* enlisting. And in this the vote of the electors followed the act. The recital of the action of the meeting of the electors shows the intention of the council to base their action upon the authority of the vote of that meeting. This clearly shows the intention of the council to grant the bounty for the benefit, at least, of the enlisted man; and the second and third resolutions show that, as a general rule, at least, the payments of bounty to whomsoever made, were such as would, in legal effect, be payments made to the men so enlisting. Of course, a payment made to any other person, for their use, or on their account, under a power of attorney, or an assignment, would be a payment in legal effect to them.

And, as it was quite customary not to pay over the bounty to the recruit until he had joined his regiment on the field and sent a certificate to that effect (as was shown in this case), it became customary for the enlisted men to make an assignment on the back of their certificate of enlistment, to some person who could thus draw the bounty in the absence of the party himself. This would be evidence, as between the assignee and the city, that the assignee had paid the soldier his bounty, and this, with the proof of his having joined his regiment, might be considered as evidence that he had, within the meaning of the first resolution, "furnished" such enlisted man. If the resolution can be understood as going beyond this, it can only be construed as intended to cover cases, which sometimes did occur, in which individual citizens, upon their own account and with their own money, had "furnished," or, in other words, hired a man to enlist in the army; a case which, in principle, does not differ from that just mentioned. Disputes might also arise between the enlisted man and others claiming to have hired and paid him to enter the army, or between the person thus assigning and the person claiming the bounty under the assignment, whether the payment

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ought to be made to the one or the other; and hence the propriety of requiring proof, before payment by the city, that the person applying for the payment had furnished the man. And we think it clear, under the resolution, that a man might "furnish" himself to the army as an enlisted man.

Such, we think, is the reasonable construction of the first resolution, considered with reference to the subject matter, the preamble and the subsequent resolutions.

On the other hand, we should be doing injustice to the patriotism of the common council of that day, to attribute to them the intention of granting the bounty without reference to the benefit of the soldier himself, who was to risk his life in defense of his country, should we assume that the object of granting such liberal bounties, for which the property and the energies of the people were to be so heavily taxed, was merely to enable bounty brokers to speculate in the blood and bones of their more patriotic fellow citizens.

The assignment executed by the plaintiff, if it can be construed to apply to any future bounty, though sufficient evidence, as between the defendant and the city, that the bounty had been paid or purchased by defendant, was, considered with reference to the mode of transacting that kind of business, by no means conclusive between the assignee and the plaintiff, but open to explanation by oral evidence like a mere receipt. That evidence was given, and showed clearly that only fifty dollars of the city bounty was, in legal effect, as between the parties themselves, assigned to defendant, and that the balance was received to the plaintiff's use.

As to the third point, we think the plaintiff, within the fair meaning of the resolution, and in view of the evidence in the case, furnished himself as an enlisted man, and as between him and the defendant, he was clearly entitled to the balance of the city bounty of two hundred and fifty dollars. In fact, we see no more plausible ground on which

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the defendant could retain this than he would have had to retain the fifty dollars which he paid, or the three hundred and fifty dollars ward bounty. The court refused to submit the evidence to the jury, and charged them to find a verdict for the defendant. He would have been much better justified upon the evidence, to have instructed them to find a verdict for the plaintiff for the two hundred and fifty dollars. But the charge which ought to have been given was, that no evidence had been given tending to establish a defense to the plaintiff's claim, and if they believed the evidence on the part of the plaintiff, which was wholly uncontradicted, they should find a verdict in his favor.

The judgment must be reversed, with costs to the plaintiff in error, and a new trial awarded.

The other Justices concurred.

William P. Manley v. Edmund C. Saunders.

Vendor: Vendee: Contract: Mistake: Estoppel. In a suit by a vendor against his vendee to compel payment of the balance on a purchase of land, where the dispute related to the price agreed to be paid, the vendor claiming that it was $3,500, subject to a mortgage of $2,500, and the vendee that it was $3,500 in all, it appearing clearly that the vendor's understanding of the contract was as he asserts, and by a preponderance of evidence that the vendee either so understood it also, or at least that, knowing how the vendor understood the negotiations, he failed to suggest any mistake, it was held that the vendee was estopped from asserting a different contract from that which he had left the vendor to understand was mutually intended.

Heard May 2 and 6. Decided July 11.

Appeal in Chancery from Allegan Circuit.

Stafford & Padgham and *J. L. Hawes*, for complainant.

G. Chase Godwin, John T. Holmes and *G. V. N. Lothrop*, for defendant.

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MANLEY v. SAUNDERS.

COOLEY, J.

This is a bill by vendor against vendee to compel payment of the balance on a purchase of land, and the dispute relates to the sum agreed to be paid. The vendor claims that it was three thousand five hundred dollars, subject to a mortgage of two thousand five hundred dollars, held by the vendee, and the vendee insists it was to be three thousand five hundred dollars in all. The vendee has been put in possession, but the title has never been conveyed. The circuit judge has found the case made by the bill to be proved.

No points of law are suggested which seem to us to require discussion, and the case may be said to rest upon the questions of fact alone. It has been to us one of the most difficult of satisfactory solution we have ever had occasion to deal with, from the utter impossibility of reconciling the evidence as to what the contract was, or of determining beyond reasonable doubt which party, or whether either is clearly and exclusively in the right. We are satisfied, however, that the complainant's understanding of the contract was precisely what he asserts by the bill, and that if such a contract was not made in fact, the case is one of mutual misapprehension. We are not so well satisfied that the defense is equally sincere. As the case is one where the sum of three thousand five hundred dollars would naturally, on the theory of either party, be the one principally mentioned, it is obvious that a misunderstanding might easily occur; but the preponderance of evidence seems to us in favor of the conclusion, either that both parties understood the contract to be as complainant asserts it was, or that defendant, knowing how complainant understood the negotiations, failed to suggest any mistake, but went on to take possession, intending, when it became necessary, to insist upon his own construction. But, even if the fact was as last suggested, he should be held estopped now from asserting a different contract from that which he has left complainant to understand was mutually intended. And

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as this was the conclusion of the circuit judge, we will not disturb his decree.

The decree will be affirmed, with costs.

The other Justices concurred.

Robert Shook and another v. William H. Proctor and others.

Equity pleading and practice: Answer: Implied admissions. Where a bill to set aside a deed of property given in exchange for other property in another state, charges that the defendants had no title to the lands given in exchange therefor, and that the deed in question was procured by false and fraudulent representations that they had a perfect title thereto, and waives an answer under oath, and the answer without oath does not deny that defendants had no title, nor allege title, but relies upon the defense that no representations of title were made, and the whole course of the proceedings has been upon the assumption or implied admission of want of title, the decree of the court below in favor of complainants will not be reversed for a failure to introduce evidence of the negative fact of want of title.

Burden of proof: Implied admissions. The effect and bearing upon the question of the burden of proof, of omissions and implied admissions in answers in chancery, considered.

Heard May 8 and 9. Decided July 11.

Appeal in Chancery from Branch Circuit.

John B. Shipman and *L. T. N. Wilson*, for complainants.

Bowen & McGowan and *C. I. Walker*, for defendants.

CHRISTIANCY, CH. J.

This was a bill filed in the circuit court for the county of Branch in chancery, to set aside a deed of certain property in Branch county, executed by the complainants to the defendants, Wm. H. Proctor and Edwin D. Lyon, on the ground that it was obtained by fraud and without consideration.

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The bill sets forth, in substance, that on the 22d day of February, 1869, complainants, being the owners of said land in the county of Branch, with a saw-mill thereon, were induced by the defendants, Wm. H. Proctor and Edwin D. Lyon, to trade the same for certain lands in Van Buren county, in the state of Iowa, of which they represented Wm. H. Proctor to be the owner (describing them); that, to induce said complainants to make such trade, said Proctor and Lyon represented to them that said Proctor had a good title to said Iowa lands, and owned them in fee; and, to win their confidence and induce them to rely upon said representations, and not to examine into the state of the title, they produced and showed a paper purporting to be a certificate of some officer who had charge of the record evidences of title in Van Buren county, Iowa, going to show that the title was good and all right; that at that time neither of complainants had any knowledge or information in regard to said title, but depended wholly upon said Proctor and Lyon's representations, as they well knew; that by such means they won the confidence of the complainants, and induced them to believe the title was good, and that, relying upon these acts and representations, complainants made the trade, and to carry out the same executed and delivered to them their warranty deed, dated February 22d, 1869, conveying to them jointly said lands in Branch county; that said Wm. H. Proctor, with his wife, executed, at the same time, to complainants, a deed purporting to convey to complainants the said Iowa lands, the consideration for which was, in fact, the conveyance by complainants, above mentioned, of the said Branch county lands; that it was distinctly understood and agreed between the parties that the deed of said Iowa lands was to be a full warranty against every thing and every body, and complainants supposed at the time they had received such a deed; that they did not do the business themselves personally, but trusted to others to fill up the deed, etc.; that it was not read to them, and they were ignorant of its con-

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tents, but supposed and believed, as it was a printed form, it was all right, and did not discover that it was a special warranty against such persons only as should claim the premises by, through or under said Proctor, until about a month after; that they would not have accepted the deed had they known what it was, and that said Proctor and Lyon knew this; that when complainant (Robert Shook) discovered that it was only a special warranty, he called upon the attorney of Proctor and Lyon, who seemed to act for them in making the papers, and claimed another deed, as this was not right; but that their attorney assured him, and finally made him believe, that the deed was all right as it was, and as good as any, and he went away satisfied for the time; that complainants supposed and believed that they got a good and perfect title at the time they got the deed to the Iowa lands; that, upon receiving the deed of complainants, said Proctor and Lyon took possession of said Branch county lands so conveyed to them, and they, and those claiming under them, have had the use and profits of it since.

Complainants further allege that they have since discovered that said Wm. H. Proctor had no title whatever to the said Iowa lands, so pretended to have been conveyed to complainants, and that complainants got no title thereby.

They charge that said pretended certificate of title, was, as they believe, a paper manufactured expressly to deceive people and to cheat them of their property; that said Proctor and Lyon knew that said William H. Proctor could not, and did not convey to them any title; that each of said representations so made by them on said trade, about said title, were false.

Complainants then allege that on the 27th of May, 1869, said Wm. H. Proctor (and wife) and Edwin D. Lyon (and wife), by deed pretended to convey an undivided one half of said Branch county property to Alonzo W. Eaton, for the nominal consideration of one thousand and five hundred dollars; but that no consideration was, in fact, paid; or, if

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any was paid, it was but a small sum merely to give color to the transaction, and entirely inadequate; that at the same time, they took back a mortgage purporting to secure one thousand and seventeen dollars of the purchase money, said amount becoming due in three yearly payments with interest, said mortgage being given, however, to said Lyon and to Mary A. Proctor, instead of her husband (Wm. H. Proctor), who was the real party in interest; that February 2, 1870, said Wm. H. Proctor by deed of that date pretended to convey an undivided one-fourth of said Branch county property to one J. N. Proctor of the state of Vermont, for the pretended consideration named in the deed, of eight hundred dollars, but in fact nothing whatever was paid, said J. N. Proctor being a relation of Wm. H. Proctor and in the ring with them; and they charge that neither said Eaton nor said J. N. Proctor are *bona fide* purchasers, but that each is chargeable with notice of the fraud so practiced upon the complainants by said Lyon and Wm. H. Proctor, and of all the equities of complainants; that said Wm. H. Proctor and Edwin D. Lyon, recently hearing that proceedings were to be instituted to set aside said trade, in order to cover up and complicate matters, made a pretended assignment of an undivided half interest in said Eaton mortgage to the defendant Newton T. Lyon, a brother of said Edwin D. Lyon; that this assignment was made without consideration, and without the knowledge or procurement of said Newton T., who is not a *bona fide* assignee for value, but holds the same for the use of said Edwin D.; that the assignment was never delivered to said Newton T.; that on the 23d July, 1870, there was filed in the register's office a paper purporting to be an assignment from, and to be executed by, said Mary A. Proctor, of an undivided half of said Eaton mortgage, to Newton Lyon, being the same person who is called Newton T. Lyon, but the assignor not knowing his full name, and the assignee being busy at his work and absent, the middle initial was not inserted; that this was never delivered to said Newton T.; charges that he

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paid no consideration for this, and that it was made without his procurement, and for the purpose of putting the same beyond the reach of complainants, and to embarrass them in obtaining a remedy.

The bill prays that complainants' deed of the Branch county property to said Wm. H. Proctor and Edwin D. Lyon, and the deed from said Wm. H. Proctor and Lyon and their wives, to Eaton, and the pretended mortgage from him to Lyon and Mary A. Proctor, the deed of said Wm. H. to J. N. Proctor, and the said pretended assignments of the mortgage to Newton T. Lyon, may each and all of them be declared and decreed fraudulent and void, as against complainants, and may be cancelled; and that complainants be decreed to be the owners of said Branch county property, and their record title thereto perfected; prays an account of rents and profits, complainants offering to reconvey to said Wm. H. Proctor any interest it may be claimed they have acquired to the Iowa lands.

The defendants put in an answer without oath (the oath being waived by the bill), admitting the ownership by complainants of said Branch county property, on the 22d of February, 1869. But defendants Wm. H. Proctor and Edwin D. Lyon say,—and the other defendants say they believe the statements to be true, in substance,—that they did not induce the plaintiff to make the trade set out in the bill in the manner therein stated, but say said Robert Shook proposed and was anxious to make such trade; that such Branch county land was subject to a mortgage which Shook said he could not pay, and that he desired to exchange for western lands; that Shook inquired about one Gregory, who he said owned some Iowa lands,—he wanted to see him and see what kind of a trade he could make; that defendant, Edwin D. Lyon, told Shook that said Gregory lands were owned by Wm. H. Proctor (one of these defendants), and that he, Shook, could make the trade with him, said Lyon, as Proctor had left directions with him to dispose of said land for his, Proctor's, benefit; but that the

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said Lyon had no interest in said land, and knew nothing of the title; that Shook then requested him, Lyon, to aid him in making such trade; and Lyon further denies,—and the other defendants believe it to be true,—that he made any such representations in regard to the title, or showed any paper in reference thereto, as set up in the bill, or that he made any representation in regard to the title; but informed him that he knew nothing of the lands or title; but admits that he did state to Shook that said Proctor had a deed which he received from Oliver A. Proctor, and that he, Lyon, had sold some of the land so received from Oliver A., to one Harris, and that Harris had informed him that he had been to Iowa, examined the land and title and found them all right, and that he requested Shook to call and see Harris on the subject; that said Wm. H. Proctor informed complainants where they could get information; that complainants relied upon such information as they chose to obtain, and not upon any representations made by defendants. Defendants admit the execution of the deed by complainants to said Wm. H. Proctor and Edwin D. Lyon, of the Branch county property, but say said property was subject to two mortgages; that the consideration stated in the deed was three thousand and five hundred dollars; that seven hundred and seventy-five dollars was the amount of said mortgages, which the grantees assumed and agreed to pay, and have since paid; that the balance of the consideration was an interest of said Wm. H. Proctor in said Iowa lands deeded to complainants. Defendants Wm. H. Proctor and wife deny—and the other defendants believe the denial to be true—that there was ever any understanding that the deed of the Iowa lands was to have been a full warranty, as alleged in the bill, but say the agreement was, they should deed to complainants all the interest of said Proctor in said lands; allege that the deed was read to the complainants before execution, and they were satisfied with the same, and accepted it with full knowledge of its contents.

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Defendant Edwin D. Lyon says—and the others believe it to be true—that the deed of complainants was made to him (with said Wm. H. Proctor), conveying to him the undivided half of the property, to save making two deeds; that he purchased said half of Wm. H. Proctor for five hundred dollars in hand paid, and was to take charge of the property, and look after the interests of said Proctor, etc. Defendants admit that said Proctor and Lyon took possession of said Branch county property. Said Wm. H. Proctor admits—and the other defendants believe it to be true—that he did deed to complainants his interest in said Iowa lands, which was the same only as he purchased of Oliver A. Proctor; and all the defendants deny that they knew that Wm. H. Proctor could not or did not convey to complainants a good title.

Defendants Wm. H. Proctor and wife and Mary A. Proctor and Edwin D. Lyon admit—and Alonzo W. Eaton and the other defendants believe it to be true—that they did convey to Alonzo W. Eaton an undivided half interest in the Branch county property; deny that it was without consideration, but say and insist that it was for a full and valuable consideration, and that Eaton took possession under his deed, and still holds and occupies the same as a *bona fide* purchaser, and that Eaton gave back the mortgage mentioned in the bill, and that the mortgage was given to the said Mary A., with said Lyon, to secure her for money advanced to pay mortgages on the property. Wm. H. Proctor admits the convey anceby him to said J. N. Proctor, alleged in the bill, of an undivided one-fourth interest of said Branch county property; that said J. N. Proctor is a relation of his, and that the consideration in said deed was eight hundred dollars, but he denies that no consideration was paid him, and says the eight hundred dollars was paid as stated in the deed. Defendants insist that said Alonzo W. Eaton and J. N. Proctor are purchasers in good faith and for value; admit that said Edwin D. Lyon made an assignment of half of the mortgage of said Eaton, to New-

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ton T. Lyon, brother of Edwin D., but deny that it was so made without the knowledge or privity of said Newton T., and insist that it was assigned for a valuable consideration, and that he is a *bona fide* purchaser; that Mary A. Proctor assigned her undivided interest in the said mortgage, to said Newton T. Lyon, and that he paid her for the same, one hundred and eighty dollars, and that the said Newton T. is a *bona fide* purchaser for value.

The case was heard on its merits, upon pleadings and proofs. The circuit court found all the material facts stated in the bill to be true, and made a decree granting substantially the relief prayed by the bill, as to all the defendants, but allowing to defendants Proctor and Lyon the amount paid by them on the incumbrances upon the Branch county property.

The evidence was conflicting, and to discuss it here in all its bearings, and to show the various grounds for belief or disbelief, could serve no useful purpose, and would lead to intolerable prolixity. We have carefully examined the pleadings and the evidence, and considered the actions and probable motives of the parties in all their bearings, and have been able to reach no other result than that arrived at by the circuit judge who tried the cause, and with whose conclusions we entirely agree. We cannot resist the conviction that Wm. H. Proctor and Edwin D. Lyon obtained the complainants' Branch county property by acts and representations which constituted not only legal, but actual fraud; that they combined and conspired to bring about that result, knowing, or having good reason to believe, that the title which Wm. H. Proctor pretended to hold by deed from his brother, Oliver A., and which, by the suspicious deed described in the bill, he pretended to convey to complainants, was not good; that the other defendants, if not originally parties to the conspiracy, subsequently acceded and became willing parties to it, aiding to the best of their ability to perfect the scheme and consummate the fraud by entangling and mystifying the title of the Branch

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county property by conveyances, mortgages and assignments, for the purpose of embarrassing the complainants in any attempt which should be made to regain it. And, in our view, the case would present a much more favorable aspect for the defendants, if it did not furnish strong grounds to suspect that some persons who were sworn as witnesses, but are not made defendants, were parties to the scheme of defrauding complainants, and perhaps any others who might be allured into the purchase of Iowa lands to which they had no good reason to believe the pretended vendors had title.

But it is urged on the part of the defendants that the want of title in defendant Wm. H. Proctor constitutes the very basis of the complainants' case, as made by their bill, and that the burden of proving that fact rests upon them; not that they should prove it by the same conclusive proof as if it were an affirmative fact, or a fact peculiarly within their own knowledge; but that they should make *prima facie* proof, fairly tending to show that the title was not, at the time, in Proctor; and that there is no such evidence in this case. While, on the other hand, it is insisted on the part of the complainants that the defendants, by their answer, and their whole course of conduct, as well as by a fair inference from the testimony of the defendant through whom the sale was made, and the whole course of examination, have virtually admitted that Proctor had no title and conveyed none to complainants.

The answer of the defendants, it is true, though not upon oath, seems studiously to avoid any allegation, claim or intimation, that Proctor either had or conveyed any title to the Iowa lands; nor does it go so far as to claim that any of the defendants believed that he ever had title, but bases the defense, as to this point, wholly upon the denial that either Proctor or Lyon ever made any representations that Proctor had any title, and insists that complainants purchased at their own risk as to title. But it is insisted by the defendants that this amounts to no admission of

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want of title; that, as the oath was waived, the answer is to be treated as a mere pleading, and, as such pleading, it differs from pleadings at law, which are held to admit whatever facts they do not deny, in the pleading of the adversary to which they are an answer; while an answer in chancery, as to those facts stated in the bill which it does not deny, simply puts the complainant to proof of that part of his case; and that a defendant, when the oath is waived, has a right, by his answer, to put complainant to the proof of the whole, or any part of his case. Such is undoubtedly the general rule as settled by the courts; though, I think, when the defendant was allowed to answer without oath, it is to be regretted that the answer should not have been placed upon the sounder footing as a pleading at law, and held to admit those facts stated in the bill which it does not deny. The rule, as it is now recognized, is, in my view, a dry technicality, without good sense or sound principle to rest upon, and might about as well have allowed the complainant to proceed to prove his case, and the defendants to contest it by counter proof without any answer at all, unless the defendant relies upon mere matter of confession and avoidance.

But it is clear, nevertheless, that a defendant may, if he choose, put in an answer admitting the whole or any part of complainant's case, thereby relieving the complainant from proof to the extent of the admission. And if he choose to put in an answer and take issue upon one only of several facts or grounds of complaint alleged in the bill, and the ground upon which he thus chooses to put his defense is one which, by implication, admits any other fact or ground of complaint alleged in the bill, I see no reason why the admission should not be available to the complainant, and relieve him from proof of the fact thus by implication admitted, though the mere fact of answering to some of the facts stated in the bill and leaving others unanswered, would not, of itself, have this effect. I know it has sometimes been said that nothing stated in the bill is

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to be regarded as admitted by the answer, unless expressly admitted.

But I have seen no case where such language has been used in which the question involved called for so strong a statement as this. And it seems to me that all that is intended by it is, that a mere failure to deny a fact in the answer is no admission of the fact, but there must be something further, something in what is said in the answer or the particular ground or issue upon which a defendant places his defense, which points to, and involves the admission in question. But where a bill, for instance, sets up the execution of a promissory note by the defendant to the complainant and its loss, claiming that the amount of it is due and unpaid, seeking to base a decree upon it in his favor, an answer, especially if not on oath, and therefore purely voluntary, which states that the note was paid to complainant and delivered up to the defendant, and that he has it in his possession, would be a very clear implied admission of the execution of the note by the defendant, and would relieve the complainant of proof of such execution.

This would certainly be the common sense conclusion anywhere outside of a court of chancery, and I have failed to see any satisfactory reason why that court, more than any other, should repudiate the dictates of common sense and sound logic upon which human affairs are conducted, for a merely arbitrary rule which is recognized by sane minds nowhere else.

Doubtless when an answer is called for under oath, and the defendant is compelled, against his will, to furnish evidence for the complainant and against himself, and to answer any fact stated in the bill to his best knowledge, information and belief, there is much stronger reason for holding that he shall not be bound by any admission not clearly and satisfactorily made; though, even in such a case, upon the principle which underlies all systems of pleading, as well as of evidence, I think it would be going too far to

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say such admission must always be made in so many words; since it is well understood that some implied admissions are quite as strong and satisfactory as if expressed.

But when the oath is waived, and the defendant is not compelled to answer all or any of the bill, I can see no just reason why the same implication should not result from such answer as he chooses to make, as would result from a pleading at law.

Now let us see how far, if at all, there is any implied admission of want of title in Proctor naturally or logically to be drawn from the matter of the answer which the defendants have put in, and the ground upon which they have chosen to rest their defense.

It is true that the bill alleged two main facts, showing how complainants had been defrauded of their property, by taking a conveyance of the Iowa land. These were, *first*, that there was no title to the Iowa lands; and, *second*, that defendants Proctor and Lyon represented the title to be good. Considered in the abstract, it is true, the denial of one of these facts alone might not seem to involve an admission of the other, as in the case of the promissory note above stated. But considered with reference to the grievance complained of, and the circumstances stated in the bill, and the ordinary notions of human conduct, the denial of the representations only, without denying the want of title in Proctor, or alleging any title in him, does involve an implied admission, of considerable force, that Proctor had no title and conveyed none. The substance of complainant's grievance, as stated in his bill, was, that Proctor had no title and complainant obtained none, and that defendant had therefore obtained his Branch county property without consideration. If he had obtained a title to the Iowa lands, it was quite immaterial whether Proctor and Lyon made the representations or not; and whatever they were they would have been harmless.

Complainant says to the defendants, "I owned the Branch county property; I conveyed it to you in exchange for those

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Iowa lands; you had no title to those lands and conveyed none to me, though you represented to me that your title was good; and you have thereby defrauded me of my land." Now it will occur to every one that the defendants, when thus charged, if they were actuated by the motives which ordinarily govern the actions of honest men, would be anxious to show, if the facts warranted it, that they had not obtained the complainant's property for nothing, whether they had made any representations on the subject or not; and if they really believed that complainant had obtained a title to the Iowa lands, and had therefore suffered no grievance, but had got what he bargained for, to say so, though they should also deny the representations charged. But in reply to this charge by complainant they simply say: "We never represented or pretended that we had or conveyed any title to the Iowa lands, and though we got your Branch county lands for the deed of those Iowa lands, and will not venture to say that we ever believed we had or conveyed to you any title, you took the deed at your own risk and it is nothing to us." It seems to me that this kind of answer involves an implied admission, of considerable force, that there was no title, and that this was a fact they did not mean to contest. And though I do not think it conclusive, as most admissions in pleading are, so as to preclude the defendants from proving a title, yet when considered in connection with the fact that Lyon, in his testimony, is also careful not to claim that Proctor had any title, nor even that he believed he had, his extreme care to show that, in all the conversations he had with complainant, he has been so careful not to say any thing which could be construed into even the assertion of his belief of a title; and the whole course of the examination of witnesses by the defense, which seemed to go upon the assumption or implied admission that there was no title; the whole conduct of the parties in reference to the Branch county property; the entanglement of the title by deeds, mortgages, and

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assignments of mortgages, all of which, we are satisfied, were mere shams for the purpose of embarrassing Shook in any attempt to regain the property; the fact that the existence of a title, if there was any, was an affirmative fact much more easy for the defendants to prove than for complainants to disprove, and that such title, if one existed, must be supposed to have been more peculiarly within the knowledge of Lyon and Proctor; that, though they had set up no title in their answer, it was still competent for them to prove one if it existed, to meet and rebut the natural inferences against it, arising from their whole course of conduct; that the proof of such title would, at any time, have put an end to complainants' case, and that an abstract or exhibition of the papers constituting such title, with a proper explanation to complainants, before the institution of the suit, would, in all probability, have prevented it: all these considerations tend so strongly to show that there was no title to the Iowa lands, and that defendants Lyon and Proctor at least were aware of that fact, that these considerations, without reference to any negative proof by complainants, of want of title, have produced upon our minds a settled conviction, a full and satisfactory belief, not only of the want of title, but that defendants Proctor and Lyon, through whom the other defendants claim, were aware of that fact, and did not undertake to show a title because they were conscious of their inability to do so.

This being so, is there any rule of law,—can there be any,—which shall so far prevent us from acting upon that belief, as to require us to hold that a *prima facie* case of want of title has not been established, and that complainants are bound to go further and introduce evidence tending to show the negative fact of want of title, before the burden of proof should be thrown upon the defendants to prove there was such title?

In view of all these facts going to show a want of title, it devolved upon the defendants to show that Proctor had

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title, and having failed to do so, or to make the attempt, the decree of the circuit court in chancery should be affirmed, with costs to complainants, in both courts.

The other Justices concurred.

Nancy McGinnis and others v. Mary Kempsey.

Witnesses: Quarrels with party: Discretion. The latitude to be allowed in collateral inquiries as to difficulties between a witness and one of the parties is a question resting somewhat upon the discretion of the trial court; and a court of review will not reverse a judgment for the exclusion of such inquiries, unless a clear abuse of discretion is made to appear.

Wills: Mental capacity: Reputation of executor named: Evidence. In a will case where the will is contested on the ground of want of capacity, evidence of bad reputation of the person named as executor is competent when accompanied with a showing of circumstances sufficient to justify an inference that the testator knew at the date of the will that his character was bad.

Wills: Mental capacity: Evidence. It is competent for contestants of a will to inquire as to the capacity of the testator at the time, to plan and execute such a paper as the will proposed.—*Kempsey v. McGinnis, 21 Mich., 123,* approved.

Evidence. The propriety of a question is not necessarily to be settled by considering it as a substantive and independent inquiry, but the preceding course of examination and the surrounding circumstances will be taken into account; and where, during a long and minute examination and cross-examination, the opinion of a medical expert as to the capacity of the alleged testator has been elicited upon groups of assumed facts, by carefully framed hypothetical questions, without each time repeating the facts assumed, a question on re-examination which did not include the hypothesis, is treated and considered as resting upon the hypothesis pointed at by the cross-examination.

Evidence. Where the person who drew the proposed will has testified as a witness for proponents, that on an occasion about a year before he drew the will he made a memorandum of a land trade between the testator and another, and that on the day of executing the will the testator called his attention to it, the exclusion of an inquiry by proponents as to what recollection he had upon the subject himself is not error; the question was immaterial; the recollection of the testator, and not of the witness, was the only thing of importance connected with the circumstance.

Wills: Charge to the jury: Presumption of sanity: Evidence. It is not error to decline to charge that, "If the jury should find that upon *the other testimony* relating to the testator's mental soundness, the evidence was balanced, they should allow the legal presumption of sanity to decide the question in the testator's favor;" the burden of proof is on the proponents of a will, to establish capacity by other evidence than the presumption of sanity, and that presumption can not have the force of an independent fact to serve as a substantial make-weight against counter proof.

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McGINNIS v. KEMPSEY.

Testamentary capacity. Upon the subject of testamentary capacity and the intent and free action essential to the validity of a will, *Kempsey v. McGinnis*, *21 Mich.*, *123*, is cited and approved.

Charge to the jury. A charge to the jury is to be considered together as a whole; and if an erroneous statement in one part of it, is so naturally and intimately connected in sense with others explanatory thereof, as to be understood by the jury as intended to be considered together, and as relating to the same point, and the charge considered as a whole is in substantial compliance with the requests of the party complaining of such error, his objection will not be sustained.

Wills: Publication. Whether it is necessary to the validity of a will executed in this state, that the testator should declare it to be his last will:—*Quære?*

Heard May 9 and 13. Decided July 11.

Error to Kalamazoo Circuit.

This is an appeal to the court below, from the order of the probate court, allowing the will of Thomas Patterson. The will was proposed by Nancy McGinnis, James McGinnis, Henry McGinnis, John McGinnis, Sarah Wiswell, Mary A. Payne, named as devisees in the will, and Botman Fitzsimmons, named as executor; and was contested by Mary Kempsey. The case was tried in the court below by jury, who found for the contestant, and the proponents bring the case here on writ of error.

The question put to Dr. Mottram, which is referred to in the opinion, was, whether, in his opinion, assuming the facts stated as to the condition of the deceased, he was capable of planning and executing, at the time specified, such a paper as the one offered as his will. This was explained to mean the mental process of originating the propositions of the will, considering them relatively, and of planning and executing the instrument proposed.

The contestant's seventeenth request to charge, referred to in the opinion, was as follows:

"17. That the will in question in this case is not valid unless the testator, Thomas Patterson, not only intended of his own free will to make such a disposition of his property as is made by such will, but was also capable of knowing what he was doing, of understanding to whom he was giving his property, and in what proportions, and whom he

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was depriving of it as heirs who would otherwise have inherited his estate; and was also capable of understanding the reasons for giving or withholding his bounty as to them."

The court also instructed the jury on the subject of mental capacity, besides reading to them what is contained upon it in the decision of this case in *21 Mich., 123*, as follows:

"Aside from the requisite formalities in the making of a will, the law defines the requisite soundness or mental capacity of the testator in this wise: A will is not valid unless the testator not only intends, of his own free will, to make such a disposition, but is capable of knowing what he is doing, of understanding to whom he gives his property, and in what proportions, and whom he is depriving of it as heirs, or as devisees under the will he makes.

"If a testator has mind enough to know and appreciate his relations to the natural objects of his bounty, and the character and the effect of the dispositions of his will, then he has mind sufficiently sound to enable him to make a valid will.

"If the jury should be satisfied that though the testator's mental powers had become enfeebled through mental decay or disease, he still had disposing mind, and if you find the evidence sufficient to show that he fully understood and intended to make the disposition which he has made of his property, then the will must stand, as touching the question of mental capacity or soundness, however unnatural or unjust its provisions may appear. Such are the tests the law prescribes for the guidance of courts and juries.

"The term, 'sound mind,' in the statute, does not mean that the testator shall have the same command of his mental faculties that he may have when in health. The law, recognizing that wills are often made *in extremis*, when the bodily powers are breaking, and the mental faculties are enfeebled, only requires that the testator shall retain so

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much of his mental power as will enable him to understand his relations to those who would be the natural objects of his bounty, the property he wished to distribute, and the manner in which he intends to distribute it.

"Upon this question I advise you, as requested by proponents' counsel: That even if the jury are satisfied that the mental powers of Patterson had become enfeebled or disturbed by disease at the time he made the alleged will, still if they find from the evidence that he did yet fully understand and intend to make the disposition which he made of his property, then the will must stand, as touching the question of mental soundness or capacity.

"You are instructed 'that if in the present case you should find from the evidence that Patterson, on the day he made the alleged will, was delirious, or that his mental faculties were otherwise obscured by the disease from which he was suffering, still this would not necessarily prevent his having sufficient capacity in law to make a will. Delirium or obscuration of the mental faculties by disease, must be so complete and so becloud the mind, that the testator does not understand the nature of the business in which he is engaged,' or does not understand at the time of making the instrument, substantially the act, the extent of his property, his relations to others who might or ought to be the objects of his bounty, and the scope and bearing of the provisions of the will, and does not possess the other qualifications I have already referred to.

"The impairing of the mental faculties by the effects of acute disease, such as delirium, or the enfeebling of them from any of the causes incident to such disease, must be to that extent which deprives him of the use of his reason and understanding to the extent already intimated. For if this is not the testator's situation, although his understanding may be to some extent obscured, and his memory troubled, yet he may make his will.

"There is an essential difference between the apparently lucid interval in delirium and in general insanity. In

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delirium the apparent returns to reason may be real and unquestionable, while those which seem to occur in insanity are delusive, the patient being as really laboring under the power of the malady as in the more distinctly marked periods of its progress; but testamentary incapacity does not necessarily pre-suppose the existence of insanity, in its technical sense. Weakness of intellect, whether arising from extreme old age, from disease or great bodily infirmity, from intemperance, or from all these causes combined, when such weakness disqualifies the testator from knowing or appreciating the nature, effect or consequences of the act he is engaged in, renders such testator incapable of making a valid will.

"The law requires that a person, in order to make a valid will, should be of sound and disposing mind and memory. And what we mean by soundness in this connection is, not that the mind should be in its full vigor and power, but that its faculties, its machinery, should be in working order, so to speak, with an active power to collect and retain the elements of the business to be performed, for a sufficient time to perceive their obvious relation to each other.

"From these considerations you will perceive that the testator must have intended of his own free will to make such a disposition of his property as is made by his will, and must have been capable of knowing what he was doing, of understanding to whom he was giving his property, and in what proportions, and whom he was cutting off from it as heirs who would otherwise have inherited his estate; and was also capable of understanding the reasons for giving or withholding his bounty as to any of them. In short, the testator, at the time of making the will, must have been capable of exercising his judgment, his reasoning faculties and a consecutive continuation of thought.

"In determining the question of mental capacity, a wide range is always permitted. The jury may look at the provisions of the will, may consider the history and relations

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of testator, his previous conduct and language in relation to those related to, or acquainted with him, and his previous determination as expressed by him as to what disposition he intended to make of his property, as well as the testimony of witnesses who swear to his actual mental condition as witnessed by them at the time of executing the will. If a party makes a will contrary to natural justice, this with other facts may be considered. But the mere fact that a will is not exactly according to what our own conceptions of justice would be, is not, of itself, sufficient to invalidate a will, for the reason that sane men are known to disagree in this respet. By 'natural justice,' we mean that which is founded in equity, in honesty and right. Natural justice requires that the parent shall care for his children. By bringing them into the world, the parent engages to provide for them. Natural justice requires that the child who has been protected in the weakness of his infancy, should protect and support that parent in the infirmity of his age. There are other relations in the history of every individual out of which obligations grow, but which are so varied and embrace so wide a range that human tribunals cannot and do not attempt to enforce them. And wherever the question is presented as to whether a natural obligation has been created, it can only be by inquiring what honor or conscience dictates. But in determining a case like this, what conscience dictates, we are not to consider alone the fact that this person or that person is a blood relation of the testator. Even under the civil law, where a parent was not allowed to disinherit his child without giving his reasons therefor,—and the law recognized fourteen reasons, either one of which was deemed sufficient to absolve the parent from what, without such reason would be deemed an obligation founded on natural justice; in short, the conduct of the child towards the parent was to be considered in determining the question as to whether natural justice required the parent to confer any portion of his property upon the child. Did the child refuse to aid

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the father and to give him his services, and did he refuse to reverence his authority, natural justice did not require the father to treat the child in disposing of his property, any different from strangers.

"I have been requested and so advise you: That there is a legal presumption raised by the law in favor of the sanity of all men, and although this presumption is not conclusive, still the jury should consider it in weighing the evidence in the case, of which for practical purposes it forms a part."

The above extract from the charge also embraces that portion of it upon the subject of natural justice to which objection is taken.

William Fletcher, H. F. Severens and *D. Darwin Hughes,* for plaintiffs in error.

Edwards & Sherwood and *G. V. N. Lothrop,* for defendant in error.

GRAVES, J.

Since our judgment in this case as reported in *21 Mich., 123,* a second trial has been had, resulting in a verdict against the validity of the instrument propounded as the last will and testament of Thomas Patterson, deceased, and the cause is again brought here to obtain a revision of certain rulings upon that trial.

Several errors are assigned in the record, but only those will be noticed which were insisted on at the hearing.

The first point is upon the exclusion of a question put by proponents on cross-examination, to the witness Echardt. This witness had testified at much length relative to decedent's malady, condition and conduct, and the intercourse between members of the McGinnis family and decedent. On cross-examination he referred to his being at decedent's place, and there visiting with the widow of John McGinnis, and stated that he was at that time paying some attention to her. He afterwards, and before his examination, married

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her. He also stated in the same connection that he went from decedent's place to that of Thomas McGinnis, and that the occasion of his leaving was some little trouble with Henry McGinnis. In answer to specific questions he further stated that he had some difficulty with Henry McGinnis, which was the occasion of his leaving Patterson's.

He was then asked what this difficulty was about, and in support and explanation of the question it was stated by proponents' counsel that they expected to show that the difficulty alluded to grew out of an alleged impropriety on the part of the witness and the widow McGinnis, and that it was expected to follow this up by showing that the witness was expelled from the place. Upon objection the question was excluded. This ruling must be viewed in connection with the offer and explanation made by proponents' counsel, and so regarded, it was not improper. The material circumstance for the jury to know, namely: that difficulty had arisen between the witness and a member of the McGinnis family, had been elicited, and it was pressing the privilege of cross-examination to questionable limits when it was proposed to trace the cause of the bad feeling to something improper in the association between the witness and the woman who had become his wife. It is quite impossible to avoid the opinion that something more was involved than evidence of bad feeling likely to cause bias in the witness. We do not intend to intimate that counsel meant to go beyond this, but it appears very clear to us that the question and explanation was mainly, if not exclusively, suited to fix a stain upon the character of the witness, if not upon that of his wife. There is much diversity of opinion respecting the latitude to be allowed in collateral inquiries of this kind, and some discretion certainly must be allowed to trial courts in permitting and refusing them. And when the refusal of such disparaging questions, not strictly relevant and material to the issue, is the subject of complaint, a court of review should hesitate to reverse unless the exclusion should appear to have

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involved a manifest abuse of such discretionary power.—*Bate v. Hill, 1 Car. & P., 100; Turnpike Co. v. Loomis, 32 N. Y., 127; La Beau v. The People, 34 N. Y., 223; Com. v. Jennings, 107 Mass., 488.*

The next objection relates to the question permitted to be put to the witness Atwater by contestant, as to the reputation of the named executor, Fitz Simmons.

The object of this question was, not to impeach Fitz Simmons as a witness, but to show his general reputation bad, as a circumstance reflecting upon the capacity of Mr. Patterson, who, it was argued, would not, if in his right mind, have been likely to appoint such a person as his executor. It is true that the offer of this evidence was accompanied by a statement that contestant would show that Mr. Patterson, at the date of the will, knew that Fitz Simmons' character was bad, and we do not discover any direct evidence in the record of that fact. But it was not necessary that Patterson's knowledge of the character of Fitz Simmons should be proved by direct evidence, and there was enough in the general facts and circumstances, to justify an inference by the jury that Patterson possessed the knowledge. Evidence was given by others of the same nature and tendency, and without objection or condition. We think the evidence was pertinent to the issue and admissible.

The fourth assignment of error is based on a question allowed to be put to Doctor Mottram, as to his opinion of Mr. Patterson's capacity to plan and execute the paper propounded as a will. It is urged that the question, as understood by the witness, involved an incorrect test of capacity. But as the question appears in every substantial particular to correspond with one we considered admissible when the case was formerly here, we do not think it needful to discuss its propriety.

The fifth assignment of error complains of the admission of the following question put to Doctor Mottram: "Suppose Patterson had contemplated, before being taken sick, to give

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to Mrs. Payne one hundred dollars, and that when this clause of the will (referring to the clause giving her one hundred dollars) was read over to him on Friday forenoon he assented to that provision: what, in your opinion, was his capacity as to his giving an intelligent assent?" The propriety of this question is not necessarily to be settled by considering it as a substantive and independent inquiry, and wholly disconnected from the precedent course of proceeding. In order to judge of its import and admissibility, it is reasonable to recur to the circumstances under which it was made. The Doctor had been subjected to a long and very minute examination respecting Mr. Patterson's condition, and his opinion had been elicited upon groups of assumed facts which the evidence indicated. Carefully framed hypothetical questions had been put to him, and these, without being repeated in terms, were subsequently referred to as a basis for numerous additional inquiries, bearing on the question of Mr. Patterson's capacity. This course was wisely pursued to avoid needless prolixity. A long and critical cross-examination followed the same method, and assumed the particulars embodied in the last hypothetical question put on the direct examination, and the witness was then re-examined by contestant and asked this question: "These different stages of the disease in pleuro-pneumonia *that you have spoken of* are simply stages which mark the progress of the inflammation, are they not?" The witness answered, "Yes sir." It would seem that at this stage, as a matter of convenience, or for some reason not explained by the record, the witness was temporarily made to leave the stand, but was soon afterwards placed upon it again in order that his examination might be resumed and completed. On resumption of the examination after this temporary interruption, the question objected to was put to the witness. On looking at the course of the examination, we think the question was fairly within legitimate limits as re-examination, and that the inquiry must have been understood as resting upon the hypothesis

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pointed at by the cross-examination, to which the re-examination related.

But aside from this view, it is not certain but that the Doctor's personal knowledge of Mr. Patterson's condition was sufficient to authorize him to answer this question, even if it were admitted to have been unconnected with assumed conditions of fact.—*Beaubien v. Cicotte, 12 Mich., 459, 501.*

The next point is made upon the exclusion of the question put by proponents to the witness Clark, who drew the paper propounded as a will. Mr. Clark had testified that about a year before he drew it, and on an occasion when Mr. Patterson and Thomas McGinnis were in his office, he made a memorandum respecting a land trade between them. He was then asked by proponents this question: "Now will you state who, upon the day this will was made, first mentioned the subject of the land trade between Patterson and Tom. McGinnis?" and the witness replied, "Mr. Patterson called my attention to it." This was followed by the question claimed to have been erroneously excluded. It was this: "Will you state what, if any, recollection *you* had upon the subject yourself?" This ruling was not objectionable. The question was not material. The witness had already shown that Mr. Patterson first referred to the matter, and was not indebted to any recollection Clark may possibly have had, and it was accordingly unimportant to ascertain whether or not Mr. Clark bore the subject in his memory.

The seventh assignment of error is grounded upon the refusal to charge according to proponents' second request, which was in these terms: "If the jury should find that, upon *the other testimony* relating to the testator's mental soundness, the evidence was balanced, the jury should permit the legal presumption of sanity to decide the question in the testator's favor."

There was no error in denying this request. When the question of capacity is actually controverted in case of a

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paper propounded as a will, it devolves upon the proponents to establish capacity by other evidence than is afforded by the common-law presumption in favor of soundness of mind, and the measure of the evidence to establish must exceed that given in opposition.

Perhaps it would be going too far to say that the statute, in requiring substantive proof of the testator's soundness of mind as a prerequisite to the establishment of the will, intended to put aside altogether and for all cases the common-law presumption in favor of sanity. But conceding the existence of the presumption as a principle to operate subject to circumstances, it is very clear that it cannot have the force of an independent fact to serve as a substantial make-weight against counter proof. Because if it could, the rule of law which casts upon proponents the necessity of showing the testator's soundness of mind by other evidence might be subverted. The force and efficacy of the presumption will vary with cases, yet it can never have much influence when the issue upon the testator's sanity is contested in the usual way, by an appeal to those facts which bear upon it. And whatever force may be due to it in given instances will be owing, not to its intrinsic weight as a distinct item of proof, but to its operation in some degree, more or less, in rendering the circumstances adduced to prove sanity more persuasive.

Whenever the facts given in evidence are such as to leave room for it to have any appreciable influence upon results, it will be entitled to be viewed rather as a property of proponents' proofs, than as something apart, and then it will not fail to be recognized by the good sense of the jury, in its tendency to strengthen the other evidence favoring sanity. The efficacy of the presumption, when it has any in contested issues, can never be predetermined, nor can any rule about it be safely laid down; and the experience and general knowledge of the triers may be trusted to consider and estimate it rightly whenever occasions make the inquiry needful. In the present case we are unable to see

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how any mere presumption in favor of Mr. Patterson's soundness of mind was entitled to much if any influence on the result. The court, however, charged that the law raised a presumption in favor of sanity, which the jury should consider, and the charge was, therefore, as favorable to proponents on this point, as any admissible view of the case authorized.

The fourteenth and sixteenth assignments of error are noticed together in proponents' brief. They complain of the charge given in response to the seventeenth request of contestant, and of that given without request, respecting testamentary capacity, and the intent and free action essential to the validity of the will. The charge on this branch of the case is quite full, and it is substantially if not precisely the same which was given on the first trial. At the former hearing in this court we thought it was not open to objection, and we see nothing to shake that opinion.

In the early part of the charge the judge advised the jury in the following terms: "No particular form of words is necessary to make a valid will. Words are used to express ideas and intent, and if the idea and intent may be *gathered* from the words, that is all that is necessary in this particular. The law does not require a testator, in order that he shall make a valid will, that he shall dictate the form and frame-work of the instrument; but the substance must be his, *and he must declare it to be his last will.* As to the signature, it is sufficient if it be by a cross or other mark by the testator as and for his signature." The fifteenth assignment of error complains of the passage here which says, that the testator must declare the instrument to be his last will. It will be observed that this passage merely speaks of a declaration as necessary, without explaining in what way it would be admissible to make it. In a subsequent part of the charge the explanation is given in these terms: "As to the publication of the will, I advise you that no *formal* declaration is necessary. The statute in that particular is *sufficiently complied with*, if the testa-

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tor, by *words or actions indicates* that he *intends* the instrument as his will, and desires to have the witnesses attest it as such. The testator need not, in terms, request the witnesses to attest the will."

These different portions of the charge were so naturally and intimately connected in sense that the jury must have understood the last as connected with, and explanatory of, the first, and so understood, the instruction, as a whole, was in substantial and almost literal compliance with the sixth and seventh requests which the proponents themselves preferred, and, therefore, if any error was committed, the proponents are not in a situation to complain of it. If the point was open to them, we should perhaps hesitate about accepting the doctrine of the charge as the law of this state.—*Osborn v. Cook, 11 Cush., 532; Ela v. Edwards, 16 Gray, 91; Vincent v. The Bishop, 3 E. L. & E., 198; 15 Jur., 365.*

The remaining objection relates to that portion of the charge which referred to natural justice. Whether those observations were needful to help the jury, is a matter of no moment. We discover nothing in them in any way calculated to mislead the jury in point of law, or to warp the verdict.

Having examined all the points which plaintiffs in error thought of sufficient importance to merit discussion, and having discovered no error of which they can complain, we think the judgment should be affirmed, with costs.

The other Justices concurred.

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Polly Shook v. Oliver A. Proctor and others.

Equity pleading and practice: Answer: Implied admissions: Burden of proof. This case is held to be within the principle of *Shook v. Proctor, supra p. 349*, upon the question of the burden of proof of want of title under a bill to set aside a deed of lands procured in exchange for other lands upon false and fraudulent representations of title to the lands received in exchange, notwithstanding the answer in this case is less open than that in the other to the implication of an admission of want of title.

Heard May 13 and 14. Decided July 11.

Appeal in Chancery from Branch Circuit.

Shipman & Loveridge and *L. T. N. Wilson*, for complainant.

Bowen & McGowan and *C. I. Walker*, for defendants.

CHRISTIANCY, CH. J.

This case is closely related, and bears a strong family likeness to the case of Robert Shook and wife against some of the same defendants, which has just been disposed of.—*Supra p. 349.* It relates to a trade the complainant was induced to make of her farm in Branch county for a pretended conveyance of Iowa lands by Oliver A. Proctor, who in the other case stood in the background, and from whom, like a mirage, the illusory vision of title there loomed up, but who here comes to the front in his own proper person, long enough to execute the deed directly to the complainant, and then and finally disappears, leaving Edwin D. Lyon and William H. Proctor, among others, as the principal actors to work out the drama as best they might, aided possibly by such suggestions of plot and counterplot as his own genius may have contributed to inspire.

Complainant was the wife of Jacob Shook, and the mother of Robert Shook (one of complainants in the other case), and sets forth in her bill, in substance, that, on the

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10th January, 1869, she was the owner of a farm of one hundred and seventeen acres of land in Branch county, and living with her husband upon the land, being their home farm, but her own separate property; that shortly before that time, Edwin D. Lyon and William H. Proctor commenced to importune her husband, Jacob Shook, to trade her farm for certain lands in Buena Vista county, Iowa, which they represented belonged to Oliver A. Proctor (which are described in the bill), said Jacob Shook to put in three hundred and twenty acres which he owned in Missouri (described), and forty acres of land in Branch county; the said Proctor and Lyon to pay one thousand five hundred dollars to boot; that said Proctor and Lyon, to induce her and her husband to trade, represented that said Oliver A. had a good title to the Iowa lands, and owned them in fee; and to win the confidence of complainant and her husband, and induce them to rely upon the title of said Oliver A. without examination, they produced and showed a paper purportiug to be a certificate of some officer who had charge of the records of deeds in the county of Buena Vista, Iowa, of which certificate she is unable to give the particulars; that complainant and her husband were ignorant of the title, and depended upon the representations of said Proctor and Lyon, as they well knew; and that relying with confidence upon their representations, she and her husband were induced to make the trade; and to carry it out, she conveyed by warranty deed (her husband joining) her Branch county farm to Benjamin Cowell, the deed being made to Cowell, as she alleges, at the request and by the procurement of said William H. Proctor and Lyon, her husband at the same time conveying to Oliver A. Proctor the land in the state of Missouri and the said forty acres in Branch county; that said William H. Proctor and Lyon paid over to her at the time one thousand five hundred dollars in cash and notes of Benjamin Cowell, since paid, and delivered to her a deed purporting to be executed by said Oliver A., and to be dated May 1st, 1869, with full cove-

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nants of warranty, and purporting to convey said Iowa land; that the reason why, as she understood, her deed was made to Benjamin Cowell, was, that said William H. Proctor and Lyon wished to borrow of him said one thousand five hundred dollars boot money, and to secure him, were to let the deed run direct to him instead of giving a mortgage for that purpose.

And she charges that the land is held by Cowell only as security; that there is no deed on record from said Cowell conveying said premises to any one; that Cowell took possession of the farm on the execution of the deed, and that a tenant of the defendants is now in possession; that said Cowell, Lyon, and the Proctors, have had the rents and profits, which she alleges were worth four hundred dollars per year, which they ought to account for. She then alleges that she has since discovered that said Oliver A. Proctor had no title to said Iowa lands, and that she obtained none by his conveyance; charges that the paper shown to her by the said Proctor and Lyon, purporting to be a certificate showing title in Oliver A. Proctor, was got up by the Proctors, or by them and said Lyon together, to deceive people with and to cheat them out of their property; that the Proctors, as well as the said Lyon, knew that Oliver A. had no title when the trade was made; that all the representations made as aforesaid by said Proctor and Lyon were false, and that she was thus induced to convey away her farm by fraud; that Cowell had notice of the fraud and is not a *bona fide* purchaser; that the Missouri land which was conveyed by her husband to said Oliver A. had been sold and placed beyond her husband's reach; and her husband claims that in equity the said one thousand five hundred dollars should be paid over to him and not to said Oliver A., the latter being a non-resident of the state, insolvent and irresponsible; prays for an answer without oath; that Cowell may be enjoined from selling, etc.; that the deed from her to said Cowell may be decreed void, and that the premises belong and should be conveyed to

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her; asks for an account of rents and profits, she offering to reconvey to said Oliver A. all the interest it may be claimed that she acquired in the Iowa lands; and she brings into court the one thousand five hundred dollars as aforesaid received by her, to be paid over to such of the parties as the court may decree; and for other and further relief, etc.

The defendants, William H. Proctor, Edwin D. Lyon and Benjamin Cowell, answer the bill, admitting that complainant was the owner of the Branch county farm, May 10th, 1869, and lived with her husband, Jacob Shook, who acted as agent of complainant in reference to the trade made of that farm for the Iowa lands; but denying that said William H. Proctor and Lyon importuned or endeavored to persuade said Jacob or complainant to trade said farm for Iowa lands, which they claimed belonged to said Oliver A. Proctor, or that they represented that Oliver A. Proctor had a good title to said Iowa land; insisting that they made no advances to complainant or her husband in regard to such trade, at any time, but that said Lyon actually advised said Jacob Shook against trading the farm for said Iowa lands and going west; but that said Jacob was anxious for the trade; that he inquired of him (said Lyon) about lands in his hands belonging to said Oliver A., and that Lyon informed him he would see said Oliver A. in a few days and let him (Shook) know what said Oliver would do in regard to a trade for the farm; and that, after seeing said Oliver, he saw said Shook and showed him a paper which said Oliver gave him in regard to the title of the Iowa lands, purporting to be a certificate of the register of Buena Vista county, Iowa, which said Lyon then and now believes to have been a genuine certificate, which he is ready, willing and anxious to produce in evidence; that Lyon informed Shook that he knew nothing of the land in Iowa, or of the title to the same, and advised him to go west and examine the title and take no person's statements; that he (said Shook) must depend entirely upon his own

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judgment, and not upon him (said Lyon), as he knew nothing of said lands and could tell him only what said Proctor had told him.

Defendants allege and insist that the said trade was with said Oliver A. Proctor, and not with defendants, Lyon and William H. Proctor, or either of them; that Lyon knew nothing about the making of the trade, and neither he nor William H. Proctor had any interest in it whatever, direct or indirect; and did not advise or express his opinion to induce Shook to make the trade; that said William H. Proctor had no interest in said Iowa lands; that the same belonged to said Oliver A., and not to said William H.; that said William H. Proctor made no statement in regard to said Iowa lands or the title. William H. Proctor denies that he showed said Shook or complainant said paper purporting to be a certificate, etc., and says he had nothing to do with the trade.

Defendants admit that the trade was made with Oliver A. Proctor substantially on the same terms as the bill states it to have been made with said William H. Proctor and said Lyon; that complainant conveyed the Branch county farm to said Cowell, and that Jacob Shook gave to said Oliver A. and to said Lyon, a deed of forty acres of land in Branch county, as described in the bill, but say he had no title to it; they also admit that Jacob Shook made to Oliver A. Proctor the conveyance of the Missouri lands mentioned in the bill; allege that the Branch county forty acres was conveyed to said Oliver A. and said Lyon for the reason that said Oliver A. was about to leave the state and proposed, if Lyon would take half the same and redeem the taxes and keep up the same and make a good sale of it, he would give him half for his services; but that Shook had no interest or title, and it was worthless.

They deny that said William H. Proctor and said Lyon paid the one thousand five hundred dollars to said complainant, but say and insist that Cowell paid it, and took the deed of the farm because he was the purchaser in fact;

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deny that said Proctor and Lyon borrowed said one thousand five hundred dollars, or that the deed was executed to Cowell as security, at all, or that there was any agreement to that effect. They allege, and said Cowell insists, that he, Cowell, took possession, as charged in said bill, but not as tenant of said Proctor and Lyon, "but as a *bona fide* purchaser for a valuable consideration as stated in said deed; and said Cowell further answering says he is a *bona fide* purchaser in good faith and for a valuable consideration, of said premises in complainant's bill of complaint described." (This is the entire allegation as to his being a *bona fide* purchaser.) The defendants say they are unable to state any thing in regard to the title of said Oliver A. Proctor to said Iowa lands, nor can they or either of them say that the paper shown to said Shook purporting to be a certificate of some officer in Buena Vista county, Iowa, was genuine or not; but they positively deny that they had any thing to do in getting up said paper, nor do they know any thing as to who did get up said paper, but they believe it to have been all right, and deny that in any respect they did any thing to deceive said Shook or said complainant.

The original bill was filed July 26, 1870. On the 27th of November, 1871, a sworn petition was filed on the part of complainant for leave to file a supplemental bill, which was granted. This supplemental bill sets forth that complainant has lately discovered that one Wesley Cowell now claims to have some interest in the premises described in the deed to Benjamin Cowell, under a pretended deed from said Benjamin to him, purporting to have been executed, acknowledged and delivered May 15th, 1870, and which was filed for record in the register's office on the 13th of August, 1870, and recorded, etc.

But complainant charges that the whole thing is a fraud upon her, got up by defendants to place the title to the premises beyond her reach. [And we may as well say here that we are satisfied from the evidence that this charge is correct, and that this deed, though appearing to

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have been executed and acknowledged on the 15th of March, 1870, was not, in fact, executed and acknowledged until the day, or about the day, of its being filed for record, and long after the filing of the bill.]

She further charges that said Wesley is a brother of said Benjamin Cowell (which is admitted) and knew, or had good reason to know, of the means by which her deed of said farm had been obtained; that he paid no value for the premises, though there may have been a nominal shifting of property to keep up appearances; that he is not a *bona fide* purchaser of the premises, etc.; that defendants are all together in this matter of obtaining property on the pretense of such western lands, etc.; that said Wesley Cowell also gave back an instrument in the form of a mortgage of the same date, to said Benjamin, of the lands so pretended to be purchased, pretending to secure one thousand four hundred dollars purchase money, to become due by instalments as described; but that said Benjamin well knew how the premises were obtained from her by his brother-in-law and Proctor, and had full notice, etc.; that the amount named in said mortgage represents rather his share in the property thus fraudulently obtained, than purchase money; that said mortgage and deed were made to entangle the title, and as a fraud upon her rights; prays that this deed and mortgage may be declared void as against her.

The defendants, Benjamin and Wesley Cowell, answer, insisting upon the validity of the deed and mortgage mentioned in the supplemental bill, insisting that both were executed in good faith and for a valuable consideration, denying all notice of any fraud upon the complainant, and claiming that said Benjamin first, and said Wesley from him, were *bona fide* purchasers for a valuable consideration, and that said Benjamin holds said mortgage in good faith and for a balance of the purchase money, etc.

The circuit court, upon a hearing on pleadings and proofs, found all the material facts stated in the original and supplemental bill, and necessary to sustain the complainant's

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case, to be true; that complainant was induced to make her deed of the Branch county farm by the fraud of the defendants William H. Proctor and Edwin D. Lyon, and that neither Benjamin Cowell nor Wesley Cowell was a *bona fide* purchaser, and that the deed from Benjamin to Wesley Cowell, and the mortgage given back, were in fraud of complainant; and made a decree granting substantially the relief prayed for by the bill.

We have examined the pleadings and the evidence in the case with much care, and an anxious desire to reach, if possible, the truth of the case. The evidence is very conflicting, and if it depended upon the number of witnesses to material facts, or the mere force of unqualified assertion, we should be compelled to find in favor of the defendants. We do not intend to enter upon a full discussion of it here; but considering the nature of the case, with all its surroundings, and the interests and motives of the parties, we cannot resist the belief that much of the testimony on the part of the defense, to facts most material to the case, is greatly overstated, if not in some instances entirely invented, to meet the exigencies of the defense. The effort which is clearly manifest on the part of some of the defendants, and some other witnesses in their behalf, to make their testimony very pointed and strong, and to establish the defense beyond all question, has had the opposite tendency upon our minds, by rendering it unnatural and impossible.

Upon the whole case, we think the conclusions arrived at by the circuit judge were correct.

Upon the question of the burden of proof of want of title to the Iowa lands, it is proper to say, that the answer in the present case is slightly different from that in the Robert Shook case, as it is not quite so open to an implied admission of the want of title; while it nowhere asserts or insists that the title of Oliver A. Proctor was good, the substance of the answer is, that they knew nothing of the title. In all other respects, so far as they bear upon this question of

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proof of want of title, the case falls clearly within the principles discussed in that case, and all the considerations there mentioned apply equally to this. Even Edwin D. Lyon will not swear, when asked the direct question, that he believed at the time of the trade, that Oliver A. Proctor had a good title. Practically it seems not to be disputed, but virtually admitted by the defendants themselves, that this Oliver A. Proctor was a cheat and a swindler. The very certificate which he is said to have furnished Lyon, of his title, is, when carefully examined with reference to the circumstances, suspicious of fraud; and, so far from being calculated to support the idea of a title, tends with considerable force to show there was none, and that it was got up for the purpose of defrauding the inexperienced and unsuspecting. And considering the whole conduct of the defendants, the overstrained efforts to show, not only that they did not induce Jacob Shook to trade, or make any representations that the title was good, but that they advised and even implored him not to trade, nor to trust to the title without examination, show that practically they did not claim there was a title. But this and the other considerations stated in the case of Robert Shook, which are equally applicable here, tend strongly to show that they knew, or had good reason to believe there was none, and practically admitted the fact. We think, therefore, the evidence was such as to establish a *prima facie* case of want of title in Proctor, and that it devolved upon the defendants to show such title, if it existed; and this they have utterly failed to do or to attempt, except by the suspicious certificate already alluded to, which, in our view, is of itself strong evidence against the existence of such title. But in addition to this the complainant has affirmatively shown, by a certificate of the commissioner of the land office, that, as to eighty acres of the land at least, Proctor had no title, and that this part of the land had been purchased at the land office by another person in March, 1869, and patented August 20, 1869.

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Upon the whole case, therefore, we think the decree of the circuit court in chancery should be affirmed, with costs in both courts, to complainant.

The other Justices concurred.

James L. Perkins v. The People.

Forgery: Evidence: Collateral issue. On a trial upon the charge of the forgery by raising it in amount, of a mortgage given on a purchase of land, and of uttering the same as genuine, evidence that the prisoner produced in a chancery cause relating to this mortgage, a quit-claim deed, which he had proposed to give on the sale of the lands but which had been rejected by the purchaser and one with covenants substituted for it, and testified relative to a pen used to write it, and endeavored to account on a comparison of the deed with the mortgage for some suspicious appearances in the writing as to the consideration and sum to be paid by the mortgage, is not so far foreign to the issue at bar as to preclude the prosecution, who have put it in, from showing that, instead of the facts being as the prisoner had explained, the draft of the quit-claim deed had been altered also, as to the consideration, so as to make it correspond with the altered mortgage; such evidence of the falsity of the explanation is both pertinent and material.

In such a case it is also competent for the prosecution to show that the sum mentioned as consideration in the mortgage in question, as well as that expressed in the condition, had been altered.

Value: Evidence: Offers: Hearsay. On the subject of value of land, it is not competent to show generally what a neighbor was offered for adjoining lands; such evidence would be mere hearsay.

Forgery: Uttering. The putting of a forged mortgage on record is a sufficient uttering. Collecting money upon it and endorsing the payments is also a sufficient uttering, whether the instrument itself was produced at the time of payment or not.

Exceptions: Practice in supreme court. Exceptions to the charges to the jury on the weight to be allowed to the prisoner's statement on the trial, will not be considered on a record which does not show that the prisoner made any statement.

Submitted on briefs May 14. Decided July 11.

Error to Lenawee Circuit.

Fidus Livermore and *C. A. Stacy*, for plaintiff in error.

Byron D. Ball, Attorney General, for the People.

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PERKINS v. PEOPLE.

COOLEY, J.

Perkins was convicted in the circuit court for the county of Lenawee, of having forged a mortgage given to his wife, Eunice Perkins, by one Heath, by raising the amount from five hundred and fifty dollars to fifteen hundred and fifty dollars, and of having uttered and published the forged instrument. The mortgage was given on a purchase of land by Heath from Perkins, for which Heath testified he was to pay one thousand dollars, and that he did pay one hundred and fifty, assumed the payment of a mortgage on the land of three hundred, and gave the mortgage in controversy for the balance. The theory of the defense was that the land was sold to Heath for fifteen hundred and fifty dollars, the mortgage given for the whole amount, but endorsed with the amount of the mortgage then on the place, and subject to which the sale was made.

It was shown in evidence that at the time the parties met to consummate their trade, Perkins produced a quit-claim deed which he proposed to execute to Heath, but Heath insisted on covenants, and the quit-claim was laid aside. The prosecution gave evidence that in a previous chancery suit relating to this mortgage, Perkins produced this quit-claim deed and made a statement under oath relative to the pen with which it was written, and claimed to account on a comparison of this instrument with the mortgage for some suspicious appearances in the writing as to the consideration and sum to be paid by the mortgage. The prosecution was then permitted to show, under objection, that instead of the facts being as the defendant explained, the draft of quit-claim deed had been altered also, the change being in the sum expressed as the consideration, and which, as now written, corresponded to the altered sum expressed in the mortgage. The reason assigned for the objection was, that the explanatory statement of defendant put in evidence by the prosecution was foreign to the issue in the case at bar, and that being so,

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the party putting it in was bound by, and could not be permitted to disprove it. The objection would have force if the statement was, in fact, collateral to the main issue; but it was not. It had a direct and very important bearing upon it, and evidence of the falsity of the explanation was not only pertinent, but very material.

Objection is also made that the prosecution was allowed to show that the sum mentioned as the consideration of the mortgage, as well as that expressed in the condition, had been altered. The reason assigned in support of the objection is, that the defendant was not charged in the information with an alteration in the statement of consideration; but as the sum expressed as the consideration, and that to be paid by the condition, are generally expected to correspond, an alteration in the one must always be a material circumstance when a like alteration in the other is asserted and undergoing investigation.

As Perkins claimed to have sold the land to Heath for a sum considerably larger than was admitted by the latter, the value of the land became important, and the prosecution gave evidence that just before the sale Perkins had offered it to different persons for much less than he claimed to have sold it for to Heath. Apparently to rebut this, the defendant called one Meyers, who testified that in the year the mortgage was given he owned land adjoining that of Perkins, and sold off two acres of it. The question was then put to him: "How much were you offered for it?" This question was objected to by the prosecution, and the objection sustained. He was then asked: "How did the land, the two acres you speak of, adjoining Perkins' land, compare with his?" This was also ruled out, but the court said to defendant's counsel: "You may ask him the value of the Perkins place, and he may make any other comparison of its worth, and he can compare it with any other land." The defense did not see fit to ask any further questions, but they insist that the court erred in these rulings. We think otherwise. What land has sold for

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may sometimes, and under some circumstances, be very satisfactory evidence of value; but testimony as to what has been offered for it, is so much open to suspicion and so inviting to fraud, unless the offer was at a judicial or other public sale, or under other circumstances furnishing like security of good faith in making it, that it must generally be very untrustworthy and unreliable. If one is testifying to his own opinion of value, he may perhaps speak of an offer made by himself, as evidence of the sincerity of his opinion, but offers in general must rank as proof with hearsay. And in this case it will be seen that the defense, by inquiring about the price offered instead of the price obtained, carefully avoided eliciting the information that might have been of value. And it is obvious that any comparison of the Meyers land with the Perkins land was immaterial, unless as furnishing a criterion of the value of the latter, and none would be furnished until the value of the former was shown,—which was not attempted.

On the point whether the forged instrument had been uttered and published, the evidence was, that it had been put upon record by some one—presumptively, at least, through the agency of a party claiming the benefit of it; that it was taken from the register's office by the defendant's daughter, and that afterwards, but before discovery of the alteration and without seeing the instrument, Heath made payments upon it which defendant indorsed. It was insisted that these facts showed no uttering, but the court charged the jury that the putting of the forged instrument upon record and collecting money upon it was a sufficient uttering. To have a forged mortgage recorded is certainly making a very important use of it as a genuine instrument, and the court was right in holding it a sufficient uttering. But collecting money upon it was also an uttering, unless the fact that the debtor at the time supposed he was paying upon the original instrument, and that the forged paper was not produced, can distinguish this from an ordinary case. We think these circumstances unimportant. Every receipt of money and indorsement thereof upon the forged

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paper was making use of it in a way implying an assertion of its genuineness, and was consequently a sufficient publishing of the instrument as true to make the offense complete. The case is stronger than *People v. Brigham, 2 Mich., 550,* or *Caton v. People, 25 Mich., 388,* in each of which the beneficial use of the instrument by the forger was defeated.

Exception is taken to the charge of the court regarding the weight to be allowed to the statement of the prisoner on the trial. But as the record does not show that the prisoner made any statement, there is nothing in this exception which we can consider. We also pass over some other exceptions which we scarcely think can be seriously relied upon.

The judgment of the circuit court must be affirmed.

The other Justices concurred.

Samuel M. Treat v. Daniel Bates and another.

Riparian rights: Drainage: Natural flow. A riparian owner has the right of drainage into the stream opposite his own lands, of such of his land as requires it, and has the right to the natural flow of the stream for that as well as for other purposes.

Riparian owner: Dam: Equitable relief. Any dam below, which sets back the water to his injury, is a violation of his rights, and may be made the ground of equitable relief.

Experts: Theories: Facts. Where the facts are brought out by distinct and reliable proofs, the theoretical statements of experts as to the scientific possibility of such facts are of little account. Facts cannot be destroyed by theories.

Equitable relief: Homestead: Nuisance. Ownership of a homestead seriously affected by a nuisance injurious to health, is a sufficient special interest to give a right to equitable interference.

Nuisance: Abatement: Homestead. And where the partial abatement of a dam would prevent the overflow of complainant's land, but its entire abatement was necessary to abate a public nuisance affecting his homestead, a decree for such complete abatement was affirmed.

Heard May 15. Decided July 11.

Appeal in Chancery from Branch Circuit.

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TREAT v. BATES.

John B. Shipman and *Jonas H. McGowan*, for complainant.

L. T. N. Wilson and *G. V. N. Lothrop*, for defendants.

CAMPBELL, J.

The bill was filed to restrain the defendants from restoring or maintaining a dam on the west branch of Coldwater river, and below the lands of complainant. It appears that complainant owns about five hundred acres of land lying east of the river, and having a river front of not far from three quarters of a mile, on sections 7 and 8 in town seven south, of range six west, in the town of Ovid, Branch county; the lands fronting on the river, beginning near the north line of section seven, and extending south to the line running east and west through the middle of the south-east quarter of that section, the river forming the western boundary. The dam in question is half a mile north of and below the complainant's northern boundary. There is also a mill-race leaving the river a little north of the middle of the north-east quarter of section seven, and running west of and parallel to the river, ending just below the dam, and furnishing water to the same grist and saw mill intended to be supplied by the dam. A dam was first built by Philo H. Crippen in 1848. In 1853 it was abated as a public nuisance under an indictment, while used by Silas N. Card. The evidence tends to prove that the dam was several times partially restored and torn down, before the race was made in 1861, which still continues, and is saved by the decree. In the latter part of 1868 defendants rebuilt the dam in violation of an injunction, and in the summer 1869 it was carried away during a freshet. This bill was filed shortly after, complaining of the threatened reconstruction as a nuisance to health, and an injury to complainant's lands, which had been overflowed and damaged by the dam when standing.

Complainant's house stands at the north end of his premises, and east of the river a considerable distance on section 8, and exposed during west winds to all exhalations

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from the dam. On the same section, and south of his house, is a large tract of low land running from north-east to south-west, approaching the river at the south end within about thirty rods, and separated from it by somewhat higher ground. A ditch runs from the southerly part of this marsh across complainant's land, striking the river at the quarter-line of section seven, called in the testimony the *old ditch*, and dug many years ago. Two other ditches striking the river further north at intervals of about 80 rods apart, and known as the middle and north ditches, have been dug more recently. The latter enters the river at the north line of section seven, where there is a highway, and a bridge known as Lockwood's bridge.

The middle branch of the Coldwater river enters the west branch just below the south line of section eight, and there are mills on this middle branch at some distance above the mouth. A little above the south line of section eight is a lake known as Teachout Lake, about half a mile long, of which the west branch forms the outlet. South of Teachout Lake, and connected with it by a narrow stream of about a quarter of a mile long, is another large lake, known as Big Lake. This connecting stream is crossed by a highway at a point called Long's bridge.

The overflowing of complainant's lands, against which protection is sought, is alleged to come chiefly by water setting back through the ditches into the large marsh, which it is claimed would be drained and available for various farm purposes, if not drowned. It is also alleged that the soil being underlaid by quicksand, the raising of the stream affects it injuriously by setting back water wherever the quicksand is reached. It is also claimed that the river borders are overflowed and made swampy by raising the dam.

The injury to health is claimed to arise from the overflowing of the low lands and the saturation of the soil with stagnant water, and the exposure of wet land by alternately raising and drawing down the water in running the mills.

The defence rests on a denial of most of the injurious

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consequences relied on, which so far as existing are claimed to be owing to other causes than the dam. A right of flowage was also relied on under deeds of former proprietors owning up to the quarter line of section seven. Those deeds conveyed this right up to that point so long as the dam should be used for hydraulic purposes, subject to the conditions that no more than ten acres of land should be covered, that the water should not be raised above the surface of the lakes, and so as not to overflow the marshes in the vicinity of the lakes. The lands north of the quarter line were purchased by complainant after those deeds were made, and in 1868, when there was no dam, and when the mills had been running by means of the race, since 1861.

One of the principal questions of fact arises concerning the effect of the dam upon the river and lands above the quarter line. Below that the rights of flowage depend on different claims; above that there is no right shown.

Upon this issue there is contradictory testimony. And the truth can only be got at by comparing the facts testified to.

The theory of the defense is that most of the overflow complained of would have taken place without any reference to the dam, by reason of the low and swampy nature of the ground; that the river banks were hard ground, and high enough to contain the water if actually raised by the dam, and that the effect of the ditch was to cut through a natural barrier which shut out the river from the swamp.

The complainant seeks to trace all the difficulty to the dam.

There is much testimony concerning the condition of the land and surroundings during the continuance of the dam, and during the time when it was down. There are also scientific and other measurements of the height of the surface of the stream, and of the ground at various points, and estimates of the effect of the dam and other erections, based on hydraulic rules. Upon some of the facts and on the scientific deductions there is a want of agreement.

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After giving the voluminous record repeated examinations and comparisons, we think it is fairly to be drawn from the evidence, that the dam as previously existing was higher than the ordinary surface of the stream at the quarter line when the dam was down, by about six inches; that the natural bank on complainant's land at that point was not far from a foot in height, and not over that; that the surface of the marsh was as much as twenty inches higher than the river at the quarter line where the old ditch terminated, which would give a fall between the marsh and the river at the rate of between six and seven feet to the mile. The natural fall between the quarter line and the dam, was between four and five feet. If the surveys are at all reliable, the old ditch ought to have made an efficient outlet for any water on the surface of the swamp and for some distance below, and there is such proof, though contradicted.

The evidence shows clearly that the marsh was not a quagmire, but reclaimable land, and that it had been so reclaimed as to be valuable for grass, and in places for wheat. It also shows that the wheat crop was drowned out after the raising of the dam, and that while the dam was up much of the marsh was saturated with water.

The defendants, however, claim that the old ditch was cut through a belt of high land, and that even if the water set back from the river, it was because the ditch had improperly exposed the back lands to a danger they would have otherwise escaped, and that without it the stream would have kept within its banks.

There is evidence tending strongly to show that the land back from the river was higher than the swamp, and might have operated as such a barrier. There is, however, a good deal of evidence tending also to show that the swamp had a natural outlet about where the ditch was dug, and that this was only an improvement of it. The nature of the vegetation would also indicate that there was some, though imperfect, natural drainage, and there is no proof of any other natural outlet. If this point became essential,

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we are not sure that the weight of evidence would not establish the ditch as on the original line of drainage.

But there can be no doubt of the right of a riparian owner to drain his own lands through his own lands into the adjoining stream. And it is equally clear that unless he has parted with it, he has a right to the use of the stream in its natural flow, and a right to prevent any such interference with the natural flow as will work material injury to any of his legal privileges. It can make no difference whether the injury to his premises will be greater or less than if he had chosen to leave them in a state of nature, if the encroachment is not warranted. He has a full claim to be protected in any lawful use of his own possessions.

The only question, in regard to these upper lands, must be whether the dam will raise the water upon them to his prejudice. This is a question of fact.

There is no room on the proofs to doubt that if the dam should be kept up and filled, the water, if it should keep at a dead level, would rise far enough to create some obstruction to the ditch, and that by this same thing he would lose the help of a running stream to facilitate the drainage. And upon the same theory that water will not rise above a dead level, the rise would be increased by the height of the sheet falling over the dam, which would be sufficient—if as thick as the witnesses suppose—to make up with the other a height of about a foot, which would be even, at ordinary stages, with the banks, if it did not flood them, and would entirely fill the mouth of the ditch, and oppose a body of dead water to its flow, and flood more or less of the bordering lands back of the ridge. But the evidence is convincing that when the dam was up, its effect was felt throughout the whole stream, not only up to Teachout Lake, but through that to Long's bridge and Big Lake, and that the water was in like manner set back into the marsh so as to affect most, if not all of it, very injuriously. The evidence on this head is so clear and

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consistent that we cannot doubt its truth. Much of the evidence to the contrary relates to temporary overflows from natural causes. There is perhaps some that cannot be harmonized with the facts alleged by complainant's witnesses. So far as this conflict goes, the impression left upon our minds by the proofs is, that the complainant's claim is made out.

The scientific testimony upon the extent of the backing up of water in such a stream is, as courts frequently find it, not to be reconciled. That water will set back in such a stream as this was, when it is dammed up, is, at least, very generally believed, and appears to be an accepted fact in hydraulic science. Whether the rules for calculating its extent, in such a stream of varying width and depth and velocity, can be got at with certainty, is a question we do not feel called upon to consider. In the present case the question is not in any way theoretical. The effect of damming has been observed, and the effect of removing a dam has been noted by persons having full means of observation; and who observed carefully. The fact has been established, that raising the dam flooded these lands, and removing it cleared them of the flood. No theory can change the facts, and we need no aid of science to confirm the proofs of eye-witnesses.

We think the complainant has shown that any dam which would be of any use to defendants will flow his lands to his serious detriment, and that he is entitled to prevent its erection.

A minor question is raised under the decree, as erroneous because requiring the whole dam to be abated. This could not be sustained on the mere ground of injury to complainant's lands by flowing them. The evidence of damage in the cause is not based on any such partial obstruction. But there are some considerations which would prevent defendants from any right to a reversal on this account.

The bill rests on the ground of a public as well as

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private nuisance, and complainant's ownership of a homestead locally affected by it is such a special interest as would, according to the general course of authorities, allow him to complain of it as a special grievance to him. Whether, in such a case, the judgment of abatement under an indictment would be conclusive evidence of nuisance, we need not determine. It would at least dispense with the necessity of again remitting the cause to a jury, before proceeding in equity. The right to maintain the dam, so far as it is derived from the grants, is confined to the time when it is to be used for hydraulic purposes. As it can not be used for any such purpose effectually when reduced to the dimensions in which the flood left it, it becomes a mere useless and pernicious obstruction to the natural course of the stream, which can benefit no one, and which produces a pool that is shown to be, in some degree, at least, detrimental to the health of the neighborhood. We do not think the decree should be interfered with on this ground.

The other Justices concurred.

Benjamin S. Compton v. James Blair.

Novation: Abandonment: New arrangement: Promissory note: Consideration. Where, by an arrangement between three, the debt of one to another has been transferred to the third, it is competent for them to make a new arrangement to transfer the debt back to the original debtor; and this may be done as well by an actual and understood abandonment of the first novation as by an explicit second novation; and a note thereafter given by the original debtor on account of such debt, cannot be said to have been without consideration.

Practice in supreme court. On writ of error to review upon exceptions to the finding, a judgment based on a finding of facts and conclusion of law on a trial by the court without a jury, the weight or sufficiency of the evidence will not be considered; the only inquiry is whether there was any evidence tending to prove the facts found.

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COMPTON v. BLAIR.

Evidence: Consideration. The evidence in this case tended to prove a consideration for the note sued upon, and to support the facts found.—CAMPBELL, J., dissenting.

Heard May 15. Decided July 11.

Error to Monroe Circuit.

C. I. Walker, for plaintiff in error.

Norris & Blair, for defendant in error.

GRAVES, J.

This suit was brought upon a promissory note, made for eleven thousand five hundred dollars by the plaintiff in error to Judge Casey, and transferred to defendant in error after maturity, and the defense is that it was given without consideration.

The case was tried in the circuit without a jury, and the court allowed recovery. The general question raised here is whether there was evidence before the circuit judge tending to show a consideration, and that question may be said to depend upon the complexion the evidence conduced to give to the status and relations of the parties when the note was made, in regard to the alleged former novation of the debt the note was given for.

It is not questioned but that the debt, which originally arose from Colonel Compton to Judge Casey, as the price of the tubing-line interest, was of a character in itself to support the note. But the position of plaintiff in error is, that such debt, by a mutual and valid arrangement between Colonel Compton, Judge Casey and one Adams, was cast upon Adams, and made to be no longer the debt of Colonel Compton, and that this state of things continued and was subsisting when the note was subsequently executed and delivered, and hence that there was no indebtedness from Colonel Compton to Judge Casey to serve as consideration.

Without disputing the proposition that a mutual arrangement was indeed made by which Adams, instead of Colonel

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Compton, was to respond to Judge Casey for the sale price of the latter's interest in the tubing line, the defendant in error maintains, among other grounds, that this exchange of Adams for Colonel Compton, as debtor to Judge Casey, was seasonably given up or superseded; that the parties were remitted to, or re-instated in, their first position and relations and made subject to their former duties, and that the note was really given in keeping with, and as one of the steps in, this course of events, and for the true and existing debt of the maker. The real point in the case is here developed, and if there was evidence which conduced to support this view, it follows that the finding cannot be disturbed.

Assuming, as is necessary in this attitude of the case, that the agreement for novation was made, the consideration for the tubing-line interest was not thereby annihilated. That remained as perfect as ever. The right of Judge Casey to the money, or rather to compensation, was not taken away. The arrangement for the novation simply changed the debtor and made the price of the tubing-line interest the debt of Adams instead of that of Colonel Compton, and it was as practicable for the parties by agreement to shift the debt back *to* Colonel Compton as it had been to shift it *from* him, and if in fact they regained their original standing and relations, it is quite unimportant whether they did so by an explicit second novation, or by an understood and actual abandonment of the first, and an actual resumption of former rights and duties respecting the debt.

The examination of the point in question involves considerations somewhat different from those which may arise on a motion for a new trial.—*Hall v. Pike, 100 Mass., 495.* When we explore the record for evidence having the claimed tendency, it is not necessary that we should find any thing direct and positive in order to uphold the judgment. It will suffice if the facts and circumstances, with the inferences flowing from them, were conducive to the result.

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And we are not to weigh evidence, or judge of its sufficiency, or pass upon the credibility of witnesses. That was the province of the court below, when sitting upon the facts in place of a jury. We have no power to question on this record the action of that court in judging, where witnesses were opposed, that the testimony of one inspired belief, and that of another did not.

Neither are we to inquire whether the finding is such as we should have made. Even if we were to conclude that we should have reached a different opinion upon the facts, that circumstance would not by itself warrant us in overruling the conclusion of the circuit court. And as all know very well, that the hearing of evidence as delivered from the stand may make an impression not always to be communicated by a written statement of the words, there is reason for saying that the reported evidence should be construed favorably to sustain the finding.

In the light of these observations, the question recurs, whether there was any evidence for the court to consider, upon the position taken by defendant in error. Was there any evidence, circumstantial or otherwise, tending to show that the three parties to the novation arrangement gave up that arrangement, resumed their original status and relations, and that the note was given on that footing?

The first circumstance most deserving of notice is the explanation given by Colonel Compton himself. The reason he gives for the existence of the note is, that Judge Casey desired it, to preclude the appearance of any connection by him with the cotton claim which was the subject of the arrangement between Adams and Colonel Compton, and that he (Colonel Compton) thereupon made and delivered the note, to be held as a mere memorandum, and simply in order to save appearances.

The note was for the large sum of eleven thousand five hundred dollars, and was complete and formal, and this explanation of the motives for issuing such a note, an instrument by its terms amounting to regular commercial

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paper, and subject to be negotiated and circulated in ordinary course as genuine, is not so extremely plausible as to be strongly persuasive. It is not usual for paper to be put afloat in this way, because not in harmony with the dictates of prudence and business rectitude; and whilst the given explanation was in itself by no means incredible, still the mind might naturally feel some hesitation when solicited to accept it. And if there was a tinge of improbability in the only hypothesis offered in opposition to that raised upon the evidence for the defendant in error, it was natural and reasonable that it should influence the mind of the court in its effort to find the true hypothesis. And more especially if, as we think was the case, the counter explanation was found to be exposed to no such criticism.

There seems to have been no substantial disagreement about several of the material circumstances.

When the interest of Judge Casey and others in the tubing line was sold by them to Colonel Compton, the judge was indebted to Adams in from seven to nine thousand dollars, and was to get from Colonel Compton eleven thousand five hundred dollars for his interest in the tubing line. At this time Colonel Compton was pressing a pending cotton claim against the government, and immediately on the purchase of the tubing line he employed Adams to work up his claim against the government, and was to allow him half of the proceeds, and it seems to have been then arranged between Adams, Colonel Compton and Judge Casey, that Adams, on the strength of his expectations from the cotton claim, should, instead of Colonel Compton, stand as debtor to Judge Casey for the price Colonel Compton had agreed to pay the judge for his interest in the tubing line, namely: eleven thousand five hundred dollars, it being understood between Adams and Judge Casey that the debt owing by the latter to Adams should apply as far as it would go.

Some months afterwards, and whether upon sufficient or insufficient grounds is for this case wholly immaterial,

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very unfavorable impressions were produced in some official minds as to the validity and good faith of the cotton claim; and this state of things, it is said, produced a change in the mind of Adams, and led him to be dissatisfied with his arrangement. At about the same time a communication appeared at Washington, which, besides assailing the claim, attributed some connection with it to Judge Casey. But Colonel Compton and Judge Casey equally deny that the judge had any such connection, and we are not called upon to inquire into the subject.

These circumstances are chiefly noticeable as evincing causes in operation suited to induce the three parties to the scheme of novation to undo that arrangement.

There is evidence that Adams complained that the claim had been misrepresented to him, and that he positively refused to prosecute it, and there is testimony on both sides that he was "unable" to go on with it. Colonel Compton testifies that he saw Adams and that the latter informed him that he was unable to fulfill his agreement, "but would make all right." Indeed, the testimony of Colonel Compton tends to show that Adams in fact failed or refused to proceed with the prosecution of the claim, and that he himself acted more or less in it.

Mr. Coleman, a witness for Colonel Compton, testifies that Judge Casey sent by him to request Colonel Compton to call and give his obligation for the price of the tubing line, and that he communicated the request to Colonel Compton. Judge Casey testified that he talked with both Adams and Colonel Compton about the situation; that Adams refused to carry out the arrangement, and declared himself not bound by it, and that Colonel Compton said he did not regard himself as bound; that he (Judge Casey) then appealed to Colonel Compton and said to him, "if this agreement between you and Adams is revoked, I am left without any pay, and you must give me something to show my interest," and that Colonel Compton agreed that he would do so, and accordingly did give the note; that

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he (Judge Casey) agreed to extend the time of payment, and in compliance therewith endorsed an extension on the note; that afterwards the demands held by Adams against him (Judge Casey), or the most of them, were satisfied; that Colonel Compton subsequently made payments upon the note, and repeatedly promised to pay the whole of it.

We do not attempt to reproduce the evidence in detail, or even to make specific references to all which favors our conclusion. After an attentive examination, we are constrained to think that the evidence to which we have alluded specially, with other facts and circumstances in the record, was in the direct line to prove and tended to prove the restoration of conditions and relations adapted to support the note.

The evidence mentioned, we think, had a tendency to show that the three parties (Adams, Colonel Compton and Judge Casey) secured an interchange of views and thereby came to a common understanding, recognized by each and all, that the novation arrangement was given up. And further, that this understanding, so reached, was followed up by measures on the part of each, inconsistent with the continuance of the novation arrangement, but suited to the duties pertaining to the state of things consequent upon the asserted change; that the evidence in question conduced to show that Adams did not go on with the prosecution of the cotton claim, and that Colonel Compton resumed personal agency about it as though it was again a matter for his personal concern; that Adams refused to pay Judge Casey, and, on the contrary, exacted payment from the judge, and that Colonel Compton personally agreed to pay to Judge Casey the very debt which, by the novation arrangement, was cast upon Adams; and that, in short, the parties resumed their old positions and relations and assumed the corresponding duties.

It was certainly not indispensable that these persons should all meet together face to face, and in express terms agree to abandon their former plan and return to the old

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state of things. It was quite sufficient if their minds met upon the subject and their accord was intelligently acted upon. And I think there was evidence which, upon an admissible construction, conduced to show such a result.

Of course it is not to be denied that there was evidence favoring the explanation given by the defendant below, but between this and the opposing theory it was for the court below to find where the truth lay.

I think the judgment should be affirmed, with costs.

COOLEY, J., concurred.

CAMPBELL, J.

I am unable to find in the testimony any thing which would tend to show any consideration for the note in suit.

Compton had fully paid for his tubing interest in the first place by transferring to Adams the interest in the cotton claim, and had no further connection with, or liability to Casey. The transactions between Casey and Adams could not thereafter concern Compton at all.

This being so, there could be no consideration for the new note unless Compton received some benefit, or got Casey to give up some existing right in exchange for it, either to himself or to Adams.

The court does not make any finding that the object of the parties was to cover up the fact that Casey had been in any way affected by a contract which related to a claim that got into his court, and finds exactly what the consideration was. The finding is, that the consideration for the new note consisted in Casey's release of Adams from his obligation, and that this was by agreement of all three. This would be a valid consideration.

But I think the testimony in no way tends to support any such finding. Casey is the only witness in regard to it who can be claimed to maintain it, and I think his evidence will not bear it out by any assertion or inference.

He swears that Adams refused to pay him on the ground

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that he found more difficulties in the way of the contract than he had any reason to anticipate. He swears also that Compton had become dissatisfied with the failure of Adams to use diligence, and that he did not feel bound by the agreement between them. But he does not say, or intimate, that there was ever any agreement or understanding between Adams and Compton that the old agreement should be rescinded, nor that this note was based on any such arrangement.

On the contrary, he swears in the most express language that there was no agreement whatever at the time this note was given, except that the time of its payment should be extended. He says that it was given because Adams refused to do as he had originally agreed, and does not even intimate, either that Adams and Compton rescinded their arrangement, or that he himself made any promise to Compton to release Adams, or that Compton desired such release. According to his statement, the note was given by Compton merely because Casey was likely to lose his debt, and for no other reason. This may have been a liberal intention, but it can form no legal consideration for a promise. The extension was no consideration if there was no debt to extend.

The fact that Adams and Compton each claimed that the other had broken his agreement, in no way indicates a mutual rescission, and does not show that either of the parties would have been willing to rescind and release the other without compensation. If the transaction would (as perhaps it might) have been a reasonable one, there is no proof that it was made, or agreed to be made. As Casey states the matter it does not appear that either Casey or Adams did, or promised to do anything as a consideration to induce Compton to make the note.

I think the judgment should be reversed.

CHRISTIANCY, CH. J., did not sit in this case.

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The People on the relation of George M. Granger v. The Judge of the Wayne Circuit Court.

Staying proceedings in another court. Proceedings in one court should not be stayed on account of a suit pending in another, unless they are identical.

Personal action: Proceeding in rem in admiralty. A personal action at law in a state court will not be stayed on account of a proceeding *in rem* in admiralty.

Common-law remedy: Estoppel. The right to have a common-law liability enforced by common-law proceedings is one of which a person cannot lawfully be deprived, unless where he has done something which raises an equity by way of estoppel.

Practice: Several suits for same cause of action. Cases cited and questions discussed as to the practice where more than one suit is pending covering the same grounds in whole or in part.

Heard May 16. Decided July 11.

Application for *mandamus*.

H. B. Brown, for relator.

L. T. Griffin, for respondent.

CAMPBELL, J.

Granger sued Thomas Murphy and Samuel Murphy, in a common-law action for services in fitting out a vessel and as master, and for commissions on her earnings, and for certain outlays and expenses.

Defendants pleaded in abatement the commencement and adverse decision of an action *in rem* against the vessel in the United States district court, and its appeal by plaintiff to the circuit court of the United States, where it was still pending. This plea having been held bad on demurrer, the court, upon an affidavit of the same facts, stayed the proceedings as to most of the claim, until the cause should be decided in the United States circuit court. A *mandamus* is now sought to vacate this order.

There seems, at first sight, much reason in requiring parties to abide by their first proceedings upon the same controversy. But there also seems to be some incongruity

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in overruling a plea in abatement, and at the same time giving substantially the full force of such a plea to an affidavit of the same facts. And it is certainly a proceeding which can only be justified by very strong reasons.

It will not be necessary to consider on this motion, whether a personal suit pending in a court of the United States for the same district should abate a subsequent and identical suit in a state court. The rule adopted in this circuit by Judge McLean, in *Earl v. Raymond, 4 McLean, 233*, allowing such a plea of a suit pending in a state court, seems to us salutary, and we should be disposed to follow it, unless it has been repudiated by the supreme court of the United States. We do not see that this has been done thus far, by any decision distinctly raising the question. But it is not necessary for us, in the present case, to examine into that matter.

In order to authorize any court to stay proceedings on account of a suit pending in another court, the two proceedings must be in all respects identical. Even in a court of equity, when it has been made to appear that an action at law is pending, the utmost that will be done is to compel the party to make a total or partial election. The court cannot elect for him. But the practice of compelling an election does not exist where a mortgagee seeks to enforce his lien, and he may at the same time seek all his legal remedies, both to collect the debt, and to recover possession of the land.—*Booth v. Booth, 2 Atk., 843; 2 Dan. Ch. Pr., 962, and cases cited.*

This practice was not changed in this state until a statute gave authority to courts of equity, in foreclosure cases, to make personal decrees for the deficiency.

No case has been cited, and we have not been able to find any, wherein it has been held that a common-law court has any right to prevent a party from enforcing a common-law remedy, on account of the pending of any but common-law proceedings. It being his absolute right to sue at common law if he chooses, the common law will pro-

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tect him in it. And inasmuch as proceedings to enforce a security are in their nature collateral to proceedings to establish a personal liability, there is always a possibility at least, that, whether the personal claim be made out or not, the remedy against the security may not be established, or, if established, may not be adequate. And while a double satisfaction can never be obtained in any court, concurrent and cumulative remedies are by no means unknown, and are not universally forbidden. Questions have frequently arisen on this subject, and the decisions do not sustain the right of courts to interfere with the lawful action of the parties suing. Admiralty and common-law remedies have not been regarded as so far alike in their rules and effect as to stand on the same footing.

In the case of *The Kalorama and The Custer, 10 Wal., 204*, it was held, the pending of proceedings *in personam* should not suspend proceedings *in rem* in admiralty. And in *Harmer v. Bell* (*The Bold Buccleugh*), *22 E. L. & Eq., 62*, the same doctrine was held by the privy council, who said that proceedings *in rem* and *in personam* were essentially different, and one should not suspend the other.

Neither, until satisfied, will even a judgment *in rem* or *in personam* prevent further proceedings on the same claim. *Toby v. Brown, 6 Eng., 308; The Bengal, Swabey, 469; The John and Mary, Id., 471; Nelson v. Couch, 15 C. B., N. S., 99.*

The latter case contains a very full discussion of the subject, and shows the necessity of the rule. And if this be true, it must necessarily follow that justice will rather be subserved than defeated by permitting the ascertainment of both classes of liabilities without needless delays. Upon this proposition also the cases are harmonious, and courts have constantly refused to stay any action at common law, on any claim that in courts not proceeding according to the common law, or even in other common-law actions involving a part, but not all, of the same issues, the main questions were to be decided.

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In *Sowter v. Dunston, 1 M. & Ry., 508,* the court refused to stay a suit against one defendant while another suit for the same cause of action, against him and another jointly, was pending. In *Wise v. Prowse, 9 Price, 393,* an action against a defendant sued jointly with others as drawers was held no ground for staying an action against him as acceptor.

Henry v. Nash, 1 Exch., 826; Giles v. Tooth, 3 C. B., 665; Newton v. Belcher, 9 Q. B., 612, were cases where numerous individual suits were brought against directors and others who were jointly liable on the same single cause of action; and stays were refused which were applied for to abide the trial of one of the causes which was at issue on the facts. In the first there were pleas in abatement overruled before the motion. In the second there was no plea of non-joinder, but the merits were shown to be the same in all the suits, except as to the individual liability for membership, which had to be made out as to each. In the third case a stay of proceedings which had been granted was set aside as beyond the authority of the court. In this latter cause of *Newton v. Belcher* a judgment was obtained for £877 beyond a sum of £1,000 paid into court. Pending a motion for a new trial, a motion for a stay of proceedings was made in still another case, of *Newton v. Liddiard, 9 Q. B., 616, note (a),* which was refused for the same reason given in *Newton v. Belcher. Coleridge, J.,* gave a further reason, also before referred to, that there was no certainty that the plaintiff would be able to collect his debt without suing all. This is the same reason underlying the shipping cases before cited.

And on this same ground it was held in *Great Northern Railway Co. v. Kennedy, 4 Exch., 417,* and in *Inglis v. Great Northern Railway Co., 16 Eng. L. & Eq., 55,* that the forfeiture of shares was no suspension of an action for calls, although when the company should realize, the defendant would be entitled to an accounting for the proceeds. The court liken the forfeiture to a mortgage claim.

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In *Covington v. Hogarth, 7 M. & G., 1013*, it was held that proceedings should not be stayed at common law by reason of the same plaintiff's having proceeded in bankruptcy for the same debt, and although before the time to plead expired the defendant had paid the debt, it was held there could be no stay unless he paid the costs also.

In *Wade v. Simeon, 1 C. B., 610*, a suit had been brought in the Exchequer on two checks, and a stipulation was made for payment, or judgment at a given time, and a judge's order was made in pursuance of the agreement to that effect. This order being afterwards set aside, and the defendant allowed to defend, the plaintiff sued on this agreement in the Common Bench, and that court held it had no right to stay the action. The language used in this case is to the same effect as that found in many of the others, viz.: that the courts cannot interfere with the right of a party to have a common-law trial in the ordinary course. *Tindal C. J.* says: "It appears to me that the plaintiff has a *prima facie* cause of action on an agreement which he sets out in his declaration, and that he has a right, by the law of the land, to insist upon having the judgment of the court thereon, either upon demurrer, or by the verdict of a jury, or the judgment of a court of error upon a bill of exceptions, or otherwise, according to the ordinary course of practice." And it was intimated by the chief justice, and the other members of the court, that nothing but bad faith in breaking an agreement, or in some other similar way, would justify interference.

This same principle has been applied in equity. In *Ostell v. Le Page, 21 Eng. L. & Eq., 640*, a stay of proceedings granted by a vice chancellor on account of proceedings which had passed to a decree in India, was set aside as granted without right, because it did not appear clearly that the Indian proceedings covered the whole ground that might have been covered by the English chancery cause. *Lord Cranworth* said: "But when the court interferes upon motion, to stop the plaintiff from proceeding, it is taking

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upon itself a very delicate jurisdiction, and one in which it ought to see that by no possibility can it be doing injustice. Looking at this decree, and at the present bill, I think that the decree could not be pleaded so as to bar the plaintiff from all the relief which she is seeking by the present suit."

In *Miles v. Inhabitants of Bristol, 3 B. & Adol., 945,* where, after a suit was brought in the Queen's Bench, another precisely similar was brought and pending in the Exchequer, and a motion was made in the Q. B. to stay proceedings and order a discontinuance, *Lord Tenterdon* said: "This court cannot interfere absolutely to prevent the plaintiff's proceeding in an action which was properly brought here; nor have we any control over the action in the Exchequer. But we have authority to say in the action depending in our own court, that he shall not proceed further in that, unless he abandon the one in the Exchequer. He must therefore make his election." And on electing to proceed in the Q. B. the rule was discharged. In that case it was admitted a plea in abatement could have been filed in the Exchequer.

In *Dicas v. Jay, 6 Bing., 519,* it appears that in a previous action a reference was had by rule of court which forbade bringing a new action, and an award was made in favor of plaintiff which he deemed too small, whereupon he brought a new action, and a motion was made in the new cause for a stay of proceedings; but the court held it had no power to grant the stay, if the party insisted on proceeding, although an opinion was intimated that the award would turn out to be a bar. *Tindal, C. J.,* said: "We have no right to prevent him from proceeding, if he chooses to do so, and therefore this rule must be discharged, without costs."

It has also been held expressly, that a court of common-law will not stay proceedings because of the pendency of proceedings in other than common-law courts.

Thus, in *Foreman v. Jeyes, 5 B. & Adol., 835,* where a

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verdict having been entered on an award, the plaintiff had been enjoined from proceeding to judgment, the Queen's Bench held they had no authority to prevent him from proceeding to judgment, and could not discharge the defendant, who was afterward relieved in the court of chancery, from his arrest on the execution.

So in *Davis v. Salter, 2 Cr. & J., 466*, where executors were enjoined from proceeding to dispose of assets, it was held a common-law court could not stay proceedings against them at law, before judgment. In *Murphy v. Cadell, 2 Bos. & P., 137*, it was also held that proceedings at law could not be stayed on account of the pendency of a suit in equity.

In *Smidt v. Ogle, 6 Taunt., 74*, the court refused to stay an action pending proceedings in the mayor's court of London. *Heath, J.*, said: "It is a common-law right of the plaintiff to sue here, and we shall not restrain it." The same rule was followed in *Laughton v. Taylor, 6 M. & W., 695.*

And in those cases where the rules differ at common-law and in admiralty, it has been held that even a verdict or judgment in the one court has no force in the other.

As in collision cases the rule at common-law allows no recovery in favor of a party at all in fault, while admiralty divides the loss if both are faulty, and therefore a decision in either court concludes nothing in the other, if the doctrine is correctly stated in *The Ann and Mary, 2 W. Rob., 189*, and *Genl. Steam Navigation Co. v. Tonkin, 4 Moore, 321*, in both of which it was so held.

The action brought in the Wayne circuit court involves claims which all arise out of the same employment, and all properly belong together in one action. The effect of the partial stay of proceedings is, either to compel a discontinuance as to the items stayed, which would involve a division contrary to legal policy, or else a delay as to the whole, which would be equally unjust. The court acted on the theory, which may be correct, that there is a difference in

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important items between the two suits. This, of itself, would bring the motion within several of the cases referred to, and render a stay improper.

The common law is averse to visiting forfeitures upon breaches of contract which can be remedied by fair deductions for damages, while the admiralty rule appears in cases like those before us to favor them. Whether in a common-law action for seamen's wages the rule should be different from that in regard to other wages, is a question which the plaintiff has a right to litigate in a common-law court, unless he has debarred himself from it.

The remedy which he has sought in admiralty is by a suit *in rem*, which involves nothing but his lien upon the vessel, and which, whether valid or invalid, is entirely independent of changes of ownership. It is in no sense a personal action, and the proceedings in admiralty do not lose their limited character because there has been no change in that respect. The rule must be reciprocal, and neither a court of law nor a court of admiralty can properly allow suits *in rem* and *in personam* to be treated as involving identical issues. Until the debt is satisfied, all the remedies are open, and each action should come to its conclusion as speedily as possible.

Where a party in a cause has made stipulations or engagements not to sue, which he is no longer disposed to keep, courts will always feel inclined to prevent injustice if they can. But the law has not left many of the important rights of parties to be governed by any one's discretion, and the privilege of proceeding according to the course of the common law is one of the most important rights of the citizen, which he is entitled to assert unless he has become absolutely estopped from doing so. According to the uniform course of decision this can only be done by asserting the same right in such a manner as to invoke elsewhere the same claim to the same kind and extent of judgment, which can be satisfied in the same way.

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As the proceedings here are not in any way identical, there should have been no stay. It would not be proper for us, therefore, to discuss the questions raised concerning the rules of jurisdiction in the admiralty court, or the extent to which it can enforce liens for such services as plaintiff claims he rendered the defendants. The *mandamus* must be granted.

The other Justices concurred.

Anthony Van Auken v. The Highway Commissioners of Vernon and Shiawassee.

Highways: Notice: Service: Commissioners: Jurisdiction. Where the proceedings to lay out a highway do not show any proof of service or posting of the notice required by the statute, except the certificate of the commissioners that they have laid out the highway, which recites that they had "given notice according to law," the action of the commissioners is without jurisdiction and void.

Highways: Record: Jurisdiction. The record of proceedings to lay out a highway, required by the statute to be kept by the town clerk, which contains no proof of service or posting of the statutory notice, is defective; and such defect is jurisdictional.

Heard July 8. Decided July 11.

Certiorari to Highway Commissioners, etc.

S. B. Raynale, for plaintiff in *certiorari.*

No counsel appeared for respondents.

CHRISTIANCY, CH. J.

The return of the highway commissioners states that "on the 3d day of January, 1873, said commissioners of highways of the township of Vernon, did issue their notice in writing that the commissioners of highways of the town-

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ships of Vernon and Shiawassee would meet at the house of D. H. Williams in Vernon, on the 18th of January, 1873, to proceed to view the premises, and ascertain and determine the necessity of laying out said highway, and to appraise the damages thereon" (to a copy of which they refer as attached); "that said notice was served by one of the commissioners of said township of Vernon, on the owners or occupants of the lands through which it was proposed to lay out said highway, either personally, or by a copy left at the residence of each of said owners or occupants, at least ten days before the time appointed for said meeting; but that no notice of said meeting was posted up in three public places in either of said townships; that no proof of the service of said notice was made to the said joint board of highway commissioners when said highway was laid out, nor at any of their meetings; and no proof of return of said service was made and filed by said joint board of highway commissioners in either of said township clerk's offices," except the mere certificate of their having laid out said highway, in which they recite generally, that they had given notice according to law.

Upon this statement of the return it is clear that there was no sufficient proof of the service and posting of notices, and that the case falls directly within our decision in *People v. Highway Commissioners of Nankin, 14 Mich., 528.*

The record of the road was also defective, and showed no jurisdiction of the commissioners to lay it out, and in this respect the case falls within our decision in *People v. Highway Commissioners of Caledonia, 16 Mich., 63.*

The proceedings of the commissioners in the attempt to lay out and establish the highway, must be quashed and set aside.

GRAVES and COOLEY, JJ., concurred.

CAMPBELL, J., did not sit in this case.

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William Hosley v. George Holmes and others.

Foreclosure: Defense: Fraud: Evidence. In this case, which was a bill to foreclose as a mortgage, a deed and bond claimed to have been given by way of security for an indebtedness, and to which the defense was set up that the deed was obtained by fraud, and that the bond produced was a different one from that which the parties actually executed, it was held that the evidence did not sustain this defense.

Deed: Delivery: Escrow: Presumption. A delivery of a deed to a third person for the benefit of the grantee, in the absence of any thing conveying a different intent, is as much a delivery as if made to the grantee himself; and when papers show upon their face that they are intended to take effect and operate from their execution, it will not be presumed that their delivery to a third person to be afterwards delivered to the parties, was merely as an escrow, and that they were not to take effect until such subsequent delivery.

Agreement construed: Delivery. An agreement that a deed given as security, and a bond intended to show the purpose of the deed and the nature of the transaction, should be left with a third person until a time specified, and then to be delivered to the parties, unless within the time they were called for by both parties together, can not be said to be unconscionable if construed according to its purpose and intent; and such an agreement shows at least that no control of the papers or right to recall them was retained by the grantors.

A provision in such a bond that in case of payment of the indebtedness secured by the deed, the grantee named in the deed was to deed the property back, is inconsistent with an intent that the deed was to have no effect until after such subsequent delivery.

Bona fide purchaser: Notice. A purchaser who has notice that another has claims upon the property, and that certain unrecorded papers relating thereto have been executed, but who, without seeing those papers, or inquiring into the nature of such claims, sees fit to buy upon the assumption that they relate only to a mortgage of record in favor of the same person, is not entitled to be protected as a *bona fide* purchaser, against such claims.

Heard April 10. Decided July 15.

Appeal in Chancery from Shiawassee circuit.

H. H. Harmon, for complainant.

Gould & Lyon, for defendants.

CHRISTIANCY, CH. J.

This was a bill to foreclose a mortgage. Substantially the case stated by the bill is this: Complainant having a mortgage (with a note) executed to him by the defendant

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Holmes, upon certain land with a grist-mill thereon, in the village of Laingsburg (Shiawassee county), dated January 9, 1868, for two thousand eighty-seven dollars and twenty-one cents, payable one year from its date, with interest at the rate of ten per cent., which was duly recorded, and being also the owner and holder of a joint and several promissory note executed to him by the defendant George Holmes and one Holland C. Hosley, also dated on the 9th of January, 1868, for six hundred sixty-two dollars and seventy-nine cents, payable one year after date with interest at ten per cent., no part of which was secured by the said mortgage; and the said mortgage and the said last mentioned note being over due and unpaid, and the said Holmes being unable to pay, but wishing further time, did, together with his wife (defendant Eliza), on the 12th day of February, 1869, execute and deliver to complainant a deed purporting to convey to him the undivided half of certain lots, known as the mill lot, in the village of Laingsburg, together with engine, boiler, weights and scales, and all appurtenances, which deed was absolute on its face and in the ordinary form of a full covenant warranty deed, but which the bill alleges was executed for the purpose of securing the payment, by the 9th of January, 1870, not only of the money secured by the mortgage above mentioned, with the interest, but also the one-half of the said note made by the said George Holmes and Holland C. Hosley, with the interest, and also to secure the expense of keeping the buildings on the premises described in the deed and mortgage, insured in the amount of two thousand five hundred dollars, for the benefit of the complainant, and for the payment of the taxes of 1869; that for the purpose of explicitly declaring and showing that such were the objects of said deed, the complainant and one Thomas Goldsmith, at the time of the execution and delivery of the deed (February 12th, 1869), executed and delivered to said George Holmes a bond or obligation to him, which bond is in the penal sum of two thousand five hundred dollars, and, after referring to said deed,

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contains the following condition: "That if the said Holmes pays said Hosley the amount of a certain mortgage which said Hosley holds against the mill, of about two thousand one hundred dollars and interest on the same; also one-half of a certain note of six hundred dollars or thereabouts, which note was signed by the said George Holmes and Holland C. Hosley; said moneys, both note and mortgage, to be paid by the 9th day of January, 1870, by said Holmes; and further, said Holmes is to remain in the mill, do one-half of the work, and pay his equal one-half of all expenses, have the half of the mill insured to the amount of two thousand five hundred dollars, which policy is to be assigned for the benefit of said Hosley in case of fire; and to have an equal one-half of all the profits of said mill to the said 9th day of January, 1870; and the said Hosley agrees, if the money and interest is paid at any time between now and the said 9th day of January, 1870, to deed the same property back to said George Holmes or any other person whom Mr. Holmes designates; but if the money mentioned in said mortgage and note be not paid by the said 9th day of January, 1870, then said deed to become operative, and this bond be null and void;"

That on the 13th day of February, 1869, the said deed and the said bond were, by mutual arrangement and consent, left with one Sidney S. Manzer of said county of Shiawassee to be kept by him until the 9th day of January, 1870, then to be delivered to complainant, unless called for by said Holmes and complainant, both being present; that in accordance with said arrangement they were kept by said Manzer without being called for by said Holmes and complainant, until January 9th, 1870, when they were delivered to complainant, and both said deed and bond were duly recorded January 29, 1870, and are now in the possession of complainant, ready to be produced and proved, etc., and to which reference is made; that after said deed and bond were so executed and delivered and placed in Manzer's hands, viz: about the 22d of July, 1869, said

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George Holmes and wife sold and conveyed the land and premises described in said deed, to defendant George A. White, by deed of that date, subject to the lien thereon of complainant's said mortgage of two thousand eighty-seven dollars and twenty-one cents and interest thereon, and also a levy thereon of four hundred sixty-eight dollars and thirty-three cents, which liens said White, in and by said deed, agreed to pay; which deed was recorded, etc., and to which reference is made; charges that White before he purchased or took said deed, had full knowledge of the existence of said deed made to complainant, and of said bond, and of complainant's lien to the amount of his said mortgage, and the half of the said Holmes and Hosley note, insurance, taxes, and expenses; that there is now due upon the mortgage and securities last mentioned, the sum of three hundred and thirty-one dollars and thirty-nine cents, and interest thereon from January 9, 1868, at ten per cent., and seventy dollars for taxes, insurance, and expenses paid by complainant on the premises.

It may as well be stated here that previous to the filing of the bill, White had paid complainant the full amount of his original mortgage of two thousand eighty-seven dollars and twenty-one cents and interest, and complainant had released that mortgage of record; so that the only questions in the case relate to the claim for half the Holmes and Hosley note, insurance, taxes and expenses.

The bill calls for an answer without oath, for foreclosure and sale, in the common form of foreclosure bills. All the defendants, by answer, admit the original mortgage of two thousand eighty-seven dollars and twenty-one cents to complainant, but allege its payment in full by White (about which there is no dispute). As to the note of Holmes and Hosley for six hundred and sixty-two dollars and seventy-two cents, White alleges his ignorance, and leaves complainant to the proof, and defendants, Holmes and wife, deny that complainant was the owner or holder of any such note as he alleges in his bill. All the defendants

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admit the making, execution, acknowledgment and recording of the deed by Holmes and wife to complainant, of February 12th, 1869, but deny that it was executed for the purpose of securing any indebtedness from Holmes to complainant, or to secure him for any expense, taxes or insurance; and deny that the deed was delivered to complainant, or to any person for him by Holmes and wife, or by their consent or direction. All the defendants deny the execution by the complainant and Goldsmith, of the bond stated in the bill, or that Holmes ever knew of the execution of the same, that such deed or bond were left with Manzer by the arrangement stated in the bill, or that they were kept under such arrangement by him, or delivered to complainant, as claimed by the bill; admit that the deed of Holmes and wife to White was subject to the original mortgage and to the attachment alleged in the bill; but deny all notice or knowledge by White of the said six hundred and sixty-two dollar note of Holmes and Hosley, or that complainant had any claim or lien on the property for any part of it, or for the insurance, taxes, or expenses, or for any thing except the original mortgage and interest. White insists that he purchased in good faith, and sets up the defense of a *bona fide* purchase for valuable consideration without notice. He, however, admits that before he paid the original mortgage, or the judgment in the attachment suit, he heard rumors that there were certain papers between Holmes and complainant, relating to the property in some way, in the possession of Manzer; and says he applied personally and by his attorney for information and inspection thereof, which Manzer refused, and refused to give copies; that the papers were sealed up in an envelope, and he refused any information in respect to them; and insists that the agreement stated in the said bill as to delivery of deed is unconscionable and void. All the defendants deny that the sum stated in the bill as due on said mortgage and deed is due. Defendants Holmes and wife say, that long before the execution of their deed to

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complainant, Holland C. Hosley had been in partnership with Holmes in the use of said premises and mill; that they could not agree and stopped doing business; that if they ever gave the six hundred and sixty-two dollar note, it was a partnership note, and should be paid out of the partnership property; that said Holland C. Hosley is largely indebted to the firm, and to said Holmes, and was at the time of the execution of said deed, and has in his hands a large amount of the property and assets of the firm; that about January 25th, 1869, complainant purchased of Holland C. one-half of said mill property, and placed his son in charge after taking possession of it; that the son took nearly all the earnings of the mill up to June 25th, 1869, and has never accounted to Holmes for, or paid over any portion thereof; that the earnings were large enough to have paid said six hundred and sixty-two dollar note and all the other indebtedness of Holmes about the business; that upon an accounting it would be found, not only that said note was paid, but that complainant would be largely indebted to Holmes; that the books of the partnership are all in the possession of the complainant, who fraudulently took and kept the same, refusing Holmes access thereto, so that he cannot make a statement in detail; claims that the amount so due should be set off against any amount which may be found due complainant.

They then set up that said deed was procured of them by fraud by complainant and Goldsmith; that they proposed to these defendants that they should execute a deed to Holmes, which might be deposited with some third person as an escrow, and complainant agreed to extend the time of payment upon the mortgage another year; and, if these defendants then could not, or did not desire to pay said mortgage, complainant agreed to pay them one thousand two hundred dollars and take the deed; and complainant pretended to have a contract to that effect written, which was read to defendants, which should be deposited with Manzer, together with the deed; that the bond referred to

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in the bill is not that contract, and contains no such agreement; and they aver that if said bond was left with said deed, it was so left without their knowledge or assent, and was afterwards prepared and left for the purpose of defrauding and cheating these defendants; that said Holmes afterwards, fearing some trick, called upon Manzer to inspect the papers, but the same were sealed up, and Manzer refused to allow him to examine them, or to inform him of the contents, and Holmes then forbade him to deliver the papers to complainant.

The case was heard on pleading and proofs, and the bill dismissed.

It will be seen that two main questions arising in the case, and upon which the whole case hangs as to Holmes and wife, are: *first*, whether the deed of Holmes and wife to complainant, of February 12th, 1869, and the bond of complainant and Goldsmith, showing the purposes of that deed, constituted the real arrangement made between the parties, or whether the deed was obtained by fraud, and the execution of a different agreement, in place of which the bond was fraudulently substituted, as claimed by the defense; and, *second*, if there was no fraud, and the arrangement made by the deed and bond was fair, and understood by the parties, then, whether there was such a delivery of the deed and bond as to give effect to them between the parties.

As to the first point, the testimony on the opposite sides is directly in conflict. That of complainant and of Goldsmith, who drew the papers, is full, specific, direct and positive, that the deed and bond were read over and understood by the defendants Holmes and wife; and that the bond is the same agreement which was made, read and signed, and the only one drawn on the occasion; and their testimony fully sustains all the allegations in the bill in respect to the execution of the deed and bond, and the terms of the written agreement upon which they were left with Manzer; that of the justice (Runciman) who took

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the acknowledgment of the deed, and witnessed both that and the bond, is also clear and satisfactory as to the execution of the deed and bond, and as to the identity of the bond, as the contract then drawn and signed. On the part of the defendants, the testimony, though sufficiently positive in most respects, is by no means clear and satisfactory. Defendants Holmes and wife, by their answer, had fully admitted the execution of the deed, though denying that it was executed for the purpose alleged by complainant. But Holmes, in his testimony, denies that any deed or conveyance was executed by him and his wife, and says it was only a contract for a deed which was executed; and yet it is clear from the testimony that he had himself gone and got the blank deed which was used for the purpose, and well understood that it was a deed; and, finally, when pressed on the point on cross-examination, admits that this deed was the paper that was executed. Again, both Holmes and wife testify, in substance, that the agreement before the papers were executed was, that if Holmes did not or could not pay the mortgage by the 9th of January, 1870, then that complainant was to have this deed (his wife admits it was a deed which was executed), and that complainant, in that event, was to pay Holmes two thousand five hundred dollars; or, in other words, that complainant was to have the land in payment for his mortgage and pay Holmes two thousand five hundred dollars besides; and they say that this agreement was embodied in the bond or instrument then executed by complainant and Goldsmith to Holmes; that she read it, and that she also read it aloud to her husband; and that the bond produced, and which the evidence shows was left with Manzer, is not the same bond then executed and read by her. And they produce their son, who testifies that he thinks the bond which was executed contained the agreement stated; he admits he did not read it; admits he witnessed some paper, don't know what. And it appears beyond all question that he did put his name to this very bond as a subscribing witness. But

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there is one feature of the case, as shown by themselves, which shows that their testimony, in reference to the bond executed at that time containing any such agreement as they state, for the payment of two thousand five hundred dollars by complainant if the mortgage was not paid, is unworthy of full credit, not only upon that, but upon every other point in the case. They both agree that the papers then executed were to be left, and that they were left in the hands of Manzer. They do not pretend that they believed the complainant and Goldsmith were unable to meet the payment of the two thousand five hundred dollars agreed upon if the mortgage should not be paid. (In their answer they stated the sum at one thousand two hundred dollars.) And yet they testify that they sold the property to White for four thousand dollars only, July 22d, 1869, complainant's original mortgage, which White was to pay, being so much of the purchase money. This mortgage alone, with interest at ten per cent. to July 22d, 1869, was two thousand four hundred and seven dollars and twenty-one cents, which, taken from four thousand dollars, leaves only one thousand five hundred and ninety-two dollars and seventy-nine cents, which defendants Holmes and wife received for the property beyond the mortgage. This sum, taken from the two thousand five hundred dollars which complainant would have been bound to pay them beyond the mortgage, January 9th, 1870, leaves nine hundred and seven dollars and twenty-one cents. This sum, it seems, they chose to lose for the sake of selling to White. This is extremely improbable, if they then understood and believed they had the contract of complainant and Goldsmith in Manzer's hands for the payment (in less than six months) of two thousand five hundred dollars beyond the mortgage.

We are satisfied that the bond produced is the bond agreed upon by the parties, and executed by the complainant and Goldsmith; and that there was no fraud in obtaining the deed. And though Holmes says he did not sign the

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endorsement on the back of the envelope in which they were left with Manzer, the proof is clear and satisfactory that he did; and he admits that he agreed they should be left with a third person, and he proposed Manzer; and that they were left with Manzer; but says he did not agree that the papers should be given up to complainant without the payment of the two thousand five hundred dollars by him. We see no reason to doubt that he agreed to and signed that memorandum, when the papers were left.

As to the question of delivery of the deed and bond to the respective parties before they were left with Manzer, the complainant testifies they were so delivered; Goldsmith only says, after they were executed they were placed in an envelope, and by direction of Holmes placed in Manzer's hands; while defendants Holmes and wife deny that they were delivered between the parties before, though they admit they were, with their concurrence, placed in Manzer's hands. And it is claimed on their part that they were placed in his hands merely as escrows, and that the deed could not take effect between the parties until a subsequent delivery, and therefore did not affect the land at the time of White's purchase.

As a delivery to a third person for the benefit of the grantee, or the party in whose favor it is made, is just as much a delivery as if made to the grantee or party himself, unless some other intent is evinced, it often becomes a difficult question whether the delivery is merely as an escrow, to take effect upon a subsequent delivery after the performance of some condition; or whether it is to be effective between the parties from the time of the first delivery. We have already found that the papers were not delivered to Manzer upon any such condition as that set up by defendants. And it may be that, upon complainant's theory, no very good reason appears why they should be left in the hands of a third person at all, instead of being delivered and recorded at the time.

But when papers show upon their face that they are

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intended to take effect and operate from their execution, it would be very difficult to maintain that the delivery to a third person was merely as an escrow, and therefore not to take effect till a subsequent delivery, although such third person was not to deliver them until a future day. In the present case, the bond, which was intended to show the purpose of the deed and the nature of the transaction, shows clearly that not only the deed but the bond were both to have effect at the time of their execution; though the agreement was that the papers should be left with Manzer till January 9th, 1870, and then to be delivered to complainant, unless within the time called for by Holmes and Hosley, both being present. This agreement is in no way unconscionable, with a conscionable construction, according to its purpose and intent; and it shows, at least, that no control of the papers, or right to recall them, was retained by the grantors. The bond provides what the respective parties are to do, and the interest they are to have in carrying on the mill in the meantime. It also clearly shows that the purpose of the deed was to be as security, from the time of its execution, for the half of the Holmes and Hosley note, and other matters mentioned, as well as the debt covered by the original mortgage; and all that was to defeat the operation of the deed at any future time was the payment of these several matters; in case of which payment complainant was to deed the property back, a provision not likely to have been inserted, if the deed in the meantime was to have no effect.

It is quite probable that the complainant and Goldsmith, if not also Holmes and wife, understood at the time that the effect of the deed and bond was to place the absolute title of the property in complainant, unless the matters of indebtedness stated in the bond should be paid before January 9, 1870.

But the deed being given by a debtor to his creditor to secure a debt in fact, the law (or rather the principle settled by courts of equity, which is a part of the law of the

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land) gives to the transaction the effect only of a mortgage, whatever the intent of the parties might have been; and so the complainant has properly treated it. He had the deed and bond both recorded after he received them of Manzer, and now asks to have the same foreclosed as a mortgage for all the matters of indebtedness secured by it, except the original mortgage, which has been paid. To this decree he is clearly entitled against all of the defendants, unless White is a *bona fide* purchaser for a valuable consideration without notice. Upon the point of actual notice the evidence is directly in conflict: while that on the part of the complainant is direct and positive to actual notice to White, prior to his purchase. White as positively denies it. He however admits that about the last of June or first of July, which was prior to his purchase from Holmes, he had a conversation with complainant in which the latter spoke of his claim on the mill property, but says he did not inquire of complainant what claim he had. He represents that this conversation was introduced by complainant, and that he, White, supposed it to relate to the original mortgage only, and says, in effect, that complainant did not mention to him the claim upon the note; while the evidence on the part of complainant is that he did mention this. We think the weight of the evidence is in the affirmative, that such actual notice was given. We think it entirely clear, upon his own evidence and that of other witnesses on the defense, that he had such notice at least, of the existence of these papers in the hands of Manzer, as to make it his duty to inquire particularly of complainant before making his purchase. To say nothing of the admission in his answer, that before he had paid said original mortgage, or the judgment on the attachment suit, he heard rumors of certain papers between Holmes and complainant, relating to the property, in possession of Manzer; and his duty, if he failed to see the papers, or to get information of Manzer concerning their contents, was to inquire of complainant, before making such payments. He admits in his testimony that

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before the purchase was made by him of Holmes and wife, they told him, not only of the original mortgage which was recorded, but, as he understood them, that there was a kind of contract and bond in Manzer's hands; that in case Holmes failed to pay the mortgage, Hosley was to take possession of Holmes' interest in the mill, by paying him back the amount stated in the bond, which was two thousand dollars or thereabouts. Even this was enough to put any prudent man on his guard against purchasing until he should ascertain what these papers were, or till he should have inquired of the complainant as to the nature and amount of the incumbrance.

And Mrs. Holmes testifies: "I was present at the time Mr. White came to buy the property of my husband. I then told him there were some sealed papers in the hands of Mr. Manzer. I told him there was a mortgage to be paid, of about two thousand one hundred dollars. I told him if that was not paid by the 9th of January, and they took the property, they were to pay us two thousand five hundred dollars." Again: "At the time of the talk with Mr. White, I told him there was a contract in the hands of Mr. Manzer. I told him all I could recollect about the bond." Defendant Holmes testifies to telling White substantially the same things.

It was therefore clearly the duty of White, as an honest, prudent man, before venturing on this purchase on the mere verbal representations of the vendor, either to learn the actual contents of the papers in Manzer's hands, or to inquire of the complainant as to the extent of his rights in the property under those papers. He had sufficient notice to put him upon inquiry, and we are entirely satisfied that complainant, in the conversation White admits he had with him, said nothing which would relieve him from the duty to make such inquiries.

He therefore can not be considered a *bona fide* purchaser without notice, and the property in his hands is liable to the complainant to the same extent as if it had remained in the hands of Holmes.

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The decree of the court below, dismissing the bill, must be reversed, with costs to complainant in both courts, and a decree entered in this court for a foreclosure and sale, as prayed by the bill, for the one-half of said note of six hundred and sixty-two dollars and seventy-nine cents, with interest thereon at the rate of ten per cent., and such amount of the taxes and insurance stated in the bill as complainant may prove upon a reference; and the record must be remitted to the court below for the purpose of executing this decree.

The other Justices concurred.

The American Insurance Company v. Orin F. Gilbert.

Insurance: Policy: Application: Warranty: Materiality to the risk. A policy of insurance, referring to an application and making it a part of the policy and a warranty by the assured, which provides that "false representations by the assured of the condition, situation, or occupancy of the property, or any omission to make known any fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in the written application or otherwise, shall render the policy void," is construed to make warranties of the representations and statements referred to, whether material to the risk or not; and materiality to the risk is held to be a limitation attached only to the omission to state facts.

Over-valuation: Warranty. It appeared in this case, by the plaintiff's own showing, that there was a clear over-valuation, known at the time to be so, of the property insured; and also a known violation of the by-laws of the company (which were made a part of the policy), such as to amount to a clear breach of the warranty, and to render the policy void.

Application: Valuation: Responsibility of the insured for statements of value. The circumstances under which the application is claimed in this case to have been made out, with the assistance and according to the suggestions of an agent of the company, were held not to be such as to make the statement of value the act of the company by such agent, instead of that of the insured.

An applicant for insurance cannot escape responsibility for the statement of facts which he inserts himself in the application, or permits an agent of the insurer to insert as his, upon which he is just as well informed as the agent himself, such as the condition, situation, and value of his own property to be insured, by showing that he was induced by such agent, knowingly and against his own judgment, to state them falsely.

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AMERICAN INSURANCE COMPANY v. GILBERT.

Statement of value: Evidence: Charge to the jury. The evidence in this case did not warrant any charge to the jury upon the hypothesis that "the plaintiff was induced by the agent of the company to sign the application for insurance, under the honest belief that it was right" in respect to the statement of values.

Policy of insurance: Notice. The form of the policy in this case was such as to notify one accepting it that he was himself responsible for the statement of values, by whomsoever made, in the application.

Over-valuation: Statement of value: Warranty: Intent. Under such a policy, the question of over-valuation in the application is not one to be submitted to the jury as a question of fraud or good faith simply; but the statement of value is to be treated as a warranty, of which any substantial over-estimate is a breach, whatever the intent.

Omissions: Materiality to the risk. The omission to state, in the application, a small mortgage upon the property, which, by the terms of plaintiff's contract of purchase, his vendor was bound to pay, and which was less than the amount unpaid on said contract, was one not material to the risk, and therefore, under the terms of the policy, unimportant.

Heard May 2. Decided July 15.

Error to Washtenaw Circuit.

W. K. Gibson, for plaintiff in error.

S. E. Engle and *H. J. Beakes*, for defendant in error.

CHRISTIANCY, CH. J.

This was an action brought by Gilbert, the defendant in error, against the insurance company, upon a policy of insurance upon a dwelling house, and barn and shed, and the personal property in each, as well as certain personal property on the farm of plaintiff. The policy was dated September 26, 1871, and was for five years from the 19th day of August 1871. The house with the barn and its adjoining shed were burned on the 11th of November, 1871, with some of the personal property in each, and the action was brought for this loss.

The policy was issued upon a written (and printed) application, signed by the plaintiff, the printed form for which seems to have been furnished by the company, with blanks to be filled, and printed questions to be answered thereon in writing by the applicant. The plaintiff had no legal title to the buildings insured, but had, in April pre-

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vious, obtained a contract from one Prentice for the purchase of the farm of eighty acres, including the buildings, for the price of four thousand dollars, upon which he had paid Prentice only fifty dollars; and the balance was to be paid in instalments, the first being for two thousand dollars payable April, 1872, upon payment of which he was to receive a deed and give a mortgage back to Prentice for the balance. Prentice covenanted to convey a good title, free of incumbrances. At the time of this contract, and at the time of the loss, there was an outstanding mortgage to one Smally on the land, upon which there was a balance of some three hundred dollars or more unpaid. The principal questions involved are: 1st. Whether there was not an over-valuation of the house and barn by the plaintiff in his application; and, 2d. Whether the plaintiff did not fail truly to state the incumbrances in answer to a question upon that subject contained in the application. The policy refers to the application, and expressly makes it "a part of the policy, and a warranty by the assured," and it further, in this immediate connection, provides that "false representation by the assured, of the condition, situation or occupancy of the property, or any omission to make known any fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in the written application or otherwise, shall render the policy void." By this provision, it is true, that, to render the policy void on account of an omission to state a fact, the fact omitted must be one material to the risk. But the provision in reference to false representation, or misrepresentation, which shall render the policy void, is not thus limited by the language used, and cannot be so limited without doing violence to that language. Nor does it follow, as argued by the counsel for the defendant in error, that the use of these terms, "false representations," and "misrepresentations," indicates an intent to reduce the object of all the statements of the assured contained in his application to that of representations, instead of warranties. On the contrary, the plain

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object, as it seems to me, of inserting this provision in reference to false representations and misrepresentations, so far as they might be contained in the application, was to explain and apply the general provision making all the statements in that application warranties.

Hence, like the warranty to which the provision refers, the effect of such false representations or misrepresentations is not made to depend upon the question, whether they relate to matters material to the risk, but they are to render the policy void, whether material to the risk or not. In other words, it would seem to have been the clear intent of the whole provision, including that of the warranty with which it is immediately connected, to make every actual misrepresentation contained in the application a warranty which, if false, should render the policy void; while the mere suppression of, or omission to state, any fact, should only have that effect when the fact suppressed was one material to the risk. This is not like the case of *Elliott v. Hamilton Mut. Ins. Co., 13 Gray, 139*, where, though the application was made part of the policy and a warranty on the part of the assured, yet, by the express language of the provision, the misrepresentation and the suppression of facts were placed upon the same footing, and both confined to material facts. Thus, only facts material to the risk came within the warranty. Where there is no express stipulation making representations warranties, courts very properly incline to treat them as representations merely, and therefore of no consequence, unless shown to be material to the risk. But parties have a right to make their own contracts upon such terms and conditions in this respect as they see fit. And if the insured chooses to make his representations warranties, the question of their materiality becomes unimportant, or rather (for this is the principle involved) the insurer is relieved from showing, and the assured is estopped from denying, that they are material to the *contract;* and no court can be permitted to say that the insurer did not deem them material

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to the risk, or that he would have made the contract upon other terms than he has made it. There may be many matters which the insurer may deem, and which experience may have satisfied him are, material to the risk, but the materiality of which he might not be able to prove to the satisfaction of a jury; and he has a right to refuse to insure, unless upon the terms that such matters shall be made warranties by the assured; and when so made, it is an agreement on the part of the assured, not only to warrant the truth of such matters, but that they are material to the contract, and that, if false, the contract shall be void. All the statements and representations, therefore, contained in the application, must be treated as warranties; and therefore, according to the general rule, as settled by the great weight of authorities, must be strictly true to authorize a recovery upon the policy. It is, however, sufficient for all the purposes of the present case to say, that they must be substantially true. The application states the value of the house at four thousand dollars, and asks for two thousand five hundred dollars insurance, and the value of the barn at three hundred and fifty dollars, and asks insurance for two hundred and fifty dollars. The application states that the loss, if any, is to be "payable to mortgagee, so far as his interest may appear,—John Prentice mortgagee."

To the question: "Where situate?" the answer is: "On section 24, town 4 south, range 5 east, county of Washtenaw." The printed part of the application states: "If the following questions are not answered, this application will be returned," and then proceeds to ask: "What is the title?" to which the answer is: "Article of agreement." "For what purpose occupied, and by whom." Answer: "Dwelling, by Orin F. Gilbert." "Is your property incumbered, by what, and to what extent?" Answer: "By mortgage, four thousand dollars." "If incumbered, what is the whole value of your real estate (including buildings and land)?" Answer: "Value, eight thousand dollars or more." To the question: "State height of buildings to

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be insured, and distance from each other," he answered: "House 26 by 30, posts 16 feet." To the question: "In what state of repair?" (which clearly refers to all the buildings to be insured), he answers: "Good."

Upon this application the policy was issued, insuring the house for two thousand five hundred dollars, and the barn for two hundred and fifty dollars, and personal property, upon the value of which no question arises in this case, for the balance, making the whole policy five thousand five hundred and fifty dollars.

The policy (in addition to the provision making the application a part of it, and a warranty, as already noticed) contains the provision, that the company are to make good to the assured, his executors, etc., "all such immediate loss or damage, not exceeding in amount the sum insured, nor exceeding two-thirds the cash value of the buildings above specified, nor exceeding the cash value of the personal property hereby insured, as shall happen by fire and lightning," etc. It also contains a provision, at the close, in these words: "This policy is made and accepted upon the above express conditions, and the charter and by-laws of the company, which are to be resorted to and used to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for, and which are hereby made a part of the policy." By the second section of the charter alluded to, it is provided that all persons insuring in the company, their respective heirs, etc., "continuing to be insured therein, shall be deemed and taken to be members thereof, for and during the term specified in their respective policies, and no longer, and shall at all times be concluded and bound by the provisions of this act." By section 6: "Insurance shall be made in all cases upon the representations of the assured, contained in his application therefor, and signed by himself or his attorney; which representation shall, in fairness and good faith, state all the material circumstances within his knowledge which may affect the risk."

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By section 12: "Every member of said company shall be and is hereby bound to pay his proportion of the losses and expenses happening or accruing in and to said company; and all buildings insured by and in said company, together with the right, title and interest of the assured to the land on which they stand, shall be pledged to said company, and the said company shall have a lien thereon against the assured during the continuance of his, her, or their policies." Now, upon the question whether there was an over-valuation upon the house and barn, the itemized estimate made by mechanics after the fire, to rebuild the house, makes the cost of building anew just such a house, only one thousand nine hundred and thirteen dollars and ninety-nine cents. The plaintiff himself admits that the house was not worth, at the time of application, the four thousand dollars, and that he knew it was not; that its real value was about three thousand dollars. He admits, also, that the barn was then worth only about one hundred and fifty dollars, as it stood, but was worth, for the purpose of repairing, two hundred to two hundred and fifty dollars. And the testimony of the other witnesses tended to show the value to range from two thousand dollars to three thousand dollars. Plaintiff also admits that he knew the company would not insure buildings for their full value; but he says he thought they would insure for about three-quarters of the value [while all the other testimony shows, and this appears upon the policy, that they only insure buildings to two-thirds]. It thus appears, by the plaintiff's own showing, that there was a clear over-valuation, known at the time to be so, both of the house and the barn; and further, that the barn was insured for a much larger sum than its entire worth, and the house for more than three-fourths its value, in known violation of the rules of the company. This must be held a clear breach of the warranty, rendering the policy void, unless the explanation which he makes, and the action of Ellis, the agent, in reference to the valuation

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and the basis of it, shall be held to show a waiver on the part of the company; or rather, that the valuation, under the circumstances, is to be treated as the act of the company itself, by its agent, and not that of the plaintiff.

His explanation is, that he was acting for the insurance company,—employed by, and as a kind of a sub-agent of, Ellis, who was the agent,—in taking applications for insurance in this company, at the time Ellis called upon him in reference to insuring his property, which was about the 19th of August, 1871, and had been so employed for some weeks previous; had some experience in fire insurance in making proof of losses; knew it was necessary to state the value of the buildings, and their true condition, in the application; and before his application, upon which this policy was issued, he had received his appointment directly from the company as agent for them, and, as he says, he had been furnished with, and had in his hands, plenty of applications and blanks ordinarily used by this company.

At this first interview with Ellis, in reference to this insurance, on the 19th of August, he says he and Ellis examined the buildings, especially the house; that Ellis wanted to know what he thought the house worth; that he answered him, "three thousand dollars or more; and then I was to put up an addition that this insurance was to cover; this was for kitchen and wood-shed, 16x24 feet, one story high. I asked him if that could be done. I was to have an addition for a summer kitchen and wood-house;" that the four thousand dollars was the estimated value of the house with the addition, and some blinds he expected to put on, and he says: "I thought he estimated it pretty high at the time." Being asked whose estimate this was, he says: "I think Mr. Ellis spoke about it. I told him I thought it would be worth three thousand dollars or more; he said he thought it would be worth four thousand dollars." As to the barn, he says: "I told him (Ellis) what I wanted to do with it; I wanted to repair the barn over; he (meaning Ellis) says, 'I will give you

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two hundred and fifty dollars insurance on it.' I told him, very well." Being asked if Ellis used any means to induce him to state that the barn was in good repair, he says: "Nothing more than that he filled the application out, and said it was all right. I told him what I was going to do." And he says Ellis told him that the insurance would cover this addition, and that he would draw it out on the application; that a diagram of the house, including the addition, was drawn by Ellis, on the back of the application. But this diagram was not referred to in the first application written by Ellis, which, in answer to the question as to the size and height of buildings to be insured, says: "House 26x30," and in the subsequent one, written by the plaintiff, in answer to the same question, he says: "House 16 by 30 feet," showing clearly that this was all he applied for insurance upon. Plaintiff admits that the house, even with the addition, would be worth less than four thousand dollars; but says at the time he supposed the insurance would cover the cellar and foundation, and he estimated these in. He admits that he did not mention to Ellis the Smally mortgage; says he did not think of it. But says he told Ellis his title was but a contract, which he explained to him, and that there was four thousand dollars to be paid; and that Ellis said it would be proper to state this as a mortgage of four thousand dollars.

This first application, then, was filled out in the handwriting of Ellis on the 19th of August, and sent afterwards to the company, stating the value of the house at four thousand dollars, its size and height "26 by 30"; title, "article of agreement." In answer to the question whether the property was incumbered: "Yes; mortgage four thousand dollars." Question: "If incumbered, what is the value of real estate, including buildings and lands?" Answer: "Eight thousand dollars." This application stated: "Losses, if any, payable to mortgagee, or as far as his interest may appear," but did not name the mortgagee. And on the 24th of August this returned to Ellis by letter for correc-

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tion by naming mortgagee, and for statement of location; and on the 27th, Ellis writes to Gilbert, inclosing application, for correction in these respects. And Gilbert himself, having his appointment as agent of the company in the same letter, sits down—as he states—and fills out the application upon which the policy was issued. He says this application, with the exception of the particulars above stated as requiring correction, was a copy of that made by Ellis. But while in most particulars it is the same, in many others it is quite variant and evidently is not a copy, but shows in several particulars, at least, he was acting on his own judgment, though the valuation of the buildings and the statement of the incumbrance are the same. Upon this application, made by the plaintiff himself, in the manner just described, the policy was issued. It is proper to state here that the testimony of the plaintiff in reference to the insertion of the statement of the valuation of the property, and the intention to insure the additions to be made to the house, and in most other particulars material to the case, is directly contradicted by Ellis, who says he did not assume to value the property at all, but left that to be done by the plaintiff, merely inserting plaintiff's own estimate; and denies that there was any understanding that the additions were to be covered by the policy. But, as the jury might have believed plaintiff, instead of Ellis, we must, for the purposes of this case, treat that of the plaintiff as true, except when contradictory, or when his own explanation shows it to be untrue, or if true, that he had no right to rely on the matter so stated.

The court charged correctly in one part of his charge, that the application was a part of the contract, and a warranty, and that each of the representations contained in it was a warranty. But he added, in qualification of this charge, that "if the application for this policy was made out, —that is, written—by the agent of the defendant, or by his dictation, and the plaintiff fully and truly stated to the agent all the material facts connected with the property,

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and in reference to which questions were asked, or information sought, and if such agent, after receiving such information, made out the application, or dictated it, and it was made out by him or by his dictation, and as he said it was sufficient and right, and the plaintiff was induced by the agent to sign the application under the honest belief that it was right, then the defendant, if you so find, will not be allowed to take advantage of any incorrect statement or omission in the application, whether it is to be considered as a warranty or not; but will be bound by the act of the agent, and will be estopped from contesting the truthfulness, or fairness or correctness of the statements contained in it."

We are only concerned with this part of the charge so far as it relates to the valuation of the buildings stated in the application; and, as relates to this point, it is proper to say that, upon the plaintiff's own statement of his own case, and upon his own oath, there was no evidence upon which such a charge could be based (and it certainly is not claimed that aside from his testimony there was any to warrant it). The very form and obvious purpose of the application, with the questions contained in it, showed that the statements it contained were to be understood as made by the applicant, and upon his responsibility, as the basis of the contract of insurance he expected to obtain. And, though a person ignorant of the meaning of the particular terms and special provisions used in such papers, or in the policy, or of the sense attached to them by the insurers, or of the particular rules or manner of doing business, has a right to rely on the instructions and assurances of the agent of such insurers, and upon his acts in reference to such matters, in filling out the application; yet he can not, therefore, escape the responsibility for the statement of facts which he inserts himself in the application, or permits the agent to insert, as his, *upon which he is just as well informed as the agent himself.* Now, the value of the plaintiff's house, in which he lived, and of his barn on the same premises, was a matter upon which, in the very nature

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of things, he must be presumed to be at least as well informed as the agent Ellis, who had been there but once. The plaintiff admits that he knew it was necessary to state the true value of the buildings, and their true condition; that the company did not insure buildings to their full value, but, as he says, about three-fourths (in fact it was but two-thirds); yet he admits he knew the house was not worth the four thousand dollars, as stated in the application, but only about three thousand dollars, on which he applied for and obtained insurance for two thousand five hundred dollars, and that the barn, stated to be worth three hundred and fifty dollars, was not worth two hundred and fifty dollars for any purpose, and he applied for and obtained insurance for two hundred and fifty dollars. And at the very time he fills out the last application, at least, he was an agent himself of the company, and was a sub-agent, procuring applications for insurance for them, at the time Ellis, the agent, wrote the first application. I think the plaintiff was bound to know that the addition, not yet built, to the house, and which might never be built (and in fact never was), did not add to the present value of the house; and the fact that in the application made out by himself he describes only the house as it was, without the addition, proves that he did know that he was placing the valuation of four thousand dollars upon the house as it was, without the addition, and that it must be so understood by the company. But he even admits the house would not be worth the four thousand dollars with the addition. In such a case, as shown by the plaintiff himself, clearly there was no ground for a charge leaving it to the jury to find whether "the plaintiff was induced by the agent to sign the application under the honest belief that it was right," in respect to the value stated. Even if the plaintiff did not know at the time of taking the application that the estimate of value was made upon his own responsibility, yet he accepted the policy upon the terms and conditions stated in it, one of which was that the charter and by-laws

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of the company were to be considered a part of the policy, to be resorted to, to explain the rights and obligations of the company; and the charter required that insurance should be made at all times upon the responsibility of the assured, upon statements contained in his application and signed by himself or his attorney. And the policy, upon its face, made the application a part of the contract and a warranty, and declared that any over-valuation should render the policy void. This, at least, notified him that he was the party responsible for the statement of value by whomsoever made, as it was not a matter upon which the agent was better informed than he was; and if not satisfied with the terms of the policy, he should have refused to accept it.

The court also erred in a subsequent portion of the charge upon the question of valuation, in submitting the question of over-valuation simply as one of fraud or good faith, and in stating to the jury that, if the applicant placed a value upon the property which he honestly believed to be within its legitimate value, it would not render the policy void, although larger than the value of the property, as estimated by others. Doubtless a very slight variation should be disregarded; but I think the applicant must be held responsible for any substantial excess when he thus warrants the value. *First*, there was no room for such a charge; as already shown, the plaintiff admitted that he knew the valuation stated in the application was above the true value; but, *second*, the question to be submitted to the jury upon this point under the warranty was not necessarily one of fraud, but simply one of fact, whether the property was in fact over-estimated, whether the intent was good or bad; and, *third*, this part of the charge was inconsistent with the portion of the charge declaring all the representations in the application warranties; and it tended to confuse the jury.

In reference to the omission to state the Smalley mortgage, or the small amount due upon it, the court charged,

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in substance, that inasmuch as Prentice, by his contract, had undertaken to convey to plaintiff a good title, and was therefore bound to pay off the amount due on this mortgage, and would not be entitled to the four thousand dollars from the plaintiff until he had done so, and could only recover the four thousand dollars less the sum due on that mortgage, the latter was, in legal effect, included in the statement of the four thousand dollar mortgage to Prentice; and as it seemed to be conceded that the sum due Prentice on the contract was what was intended as the four thousand dollar mortgage, we think this charge substantially correct. I do not see the force of the objection argued by the counsel for the plaintiff in error: "Suppose," he says, "that Gilbert should pay the whole purchase price, relying on Prentice to remove the mortgage lien, and Prentice should not pay it, and allow it to be foreclosed; or suppose the holder should foreclose and Gilbert refuse to pay the amount of the four thousand dollars, choosing to rely on the personal responsibility of Prentice to carry out the contract, and Prentice also refuses to pay, then the land may be sold and Gilbert driven to a personal action against Prentice."

But all this might equally happen if the mortgage had been mentioned; and such suppositions rest upon no different ground from one which supposes Gilbert may fail, or not choose to pay the contract price to Prentice, which included this mortgage; and that his rights may thus be lost. And in case Gilbert should fail or be likely not to pay the contract price, and the insurance company should seek to be subrogated to his rights, the mortgage debt would, as to them, also constitute a part of the purchase price yet coming to Prentice; and they could avail themselves of it as so much payment. The omission to state this fact, within the express provision of the policy, could not prejudice the plaintiff, unless the existence of the mortgage debt to Smalley was "material to the risk;" and we think it so clear that it was not material, that it was quite

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unnecessary to submit to the jury the question of its materiality.

Several other questions were raised by the exceptions and assignments of error, but as they were not relied upon on the argument, it is unnecessary to notice them.

The judgment must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

Nathan S. Crane v. William H. Grassman.

Declaration: Consideration: Evidence. It is not essential that a declaration upon the common counts in assumpsit should set forth what was the consideration for an alleged promise; and an objection to evidence of the consideration, upon that ground, is untenable.

Declaration: Common counts: Landlord and tenant: Promise to pay for repairs. One who has made repairs upon his own store under an arrangement with his tenant that he should make such repairs, and that the tenant might thereupon surrender his lease, and in consideration thereof should pay him for the repairs, may recover of the tenant the cost of the repairs, under the common counts in assumpsit, without setting up the special circumstances.

Submitted on briefs July 8. Decided July 15.

Error to Lenawee Circuit.

George L. Bachman, for plaintiff in error.

Greenly & Stearns, for defendant in error.

GRAVES, J.

Grassman sued Crane before a justice, and declared upon all the common counts in assumpsit, and "especially for work, labor, services and materials furnished in repairing the store of plaintiff, lately occupied by defendant, in

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the city of Adrian, so as to put it in as good condition as when first occupied by defendant." The plea was the general issue. After trial before the justice, the case was carried, by appeal, to the circuit court, where it was tried upon the same pleadings, before a jury.

It appeared that the defendant had held a lease of the plaintiff's store, and that the parties made an arrangement for a surrender, and the plaintiff claimed that when this took place the building needed some little repairs to make it tenantable, and that the defendant then agreed that the plaintiff might make them, and that when made he would pay for them. The plaintiff further claimed that he made the repairs, and that they cost and were worth twenty-three dollars and fifteen cents; and there was evidence tending to support these claims.

The defendant claimed that he only agreed to pay for repairs to the extent of four or five dollars, and there was evidence tending to support this position.

As we look at the record there is but a single question in the case.

The defendant objected that the declaration set forth no consideration for the alleged promise to pay for repairs, and that therefore all testimony on that subject should be excluded. This objection was untenable. The declaration contained the common counts, and it was not necessary that they should explain what the consideration consisted of. That was matter of evidence.

The court in effect charged that if the agreement, as claimed by the plaintiff, was made, and the repairs done under it, the defendant was liable; and this was correct. Assuming, what the jury must have found, that the defendant, in consideration of the giving up of the lease, promised to pay for the repairs when made, and that the plaintiff had in fact made them, there was nothing behind but the payment of the price in money, and to recover this the plaintiff was at liberty to declare generally, upon the common counts, and was not required to set up special

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circumstances.—*2 Greenleaf Ev.*, § *104*, and authorities cited.

There is no error, and the judgment must be affirmed, with costs.

COOLEY, J., and CHRISTIANCY, CH. J., concurred.

CAMPBELL, J., did not sit in this case.

Hugh McCurdy v. Eliza G. Clark and another.

Mortgages payable in instalments. Where several distinct payments are secured by one mortgage, no one of them has any preference over the rest in consequence of its falling due sooner, but all have equal claims to be paid ratably out of the land.

Mortgages payable in instalments: Foreclosure by advertisement. Under our statute (*Comp. L.*, § *6915*), a mortgage payable in instalments stands upon the same basis as to foreclosure, as if each instalment were secured by a separate and independent mortgage, neither having priority over any others; and a foreclosure under the power of sale, for an instalment simply, is entirely unsuited to the enforcement of the respective liens, or the adjustment of the respective interests.

Foreclosure by advertisement for an instalment. Such a sale, expressly made subject to the subsequent instalments, will leave such instalments a lien on the land as against both the mortgagor and the purchaser at the sale.

Such a sale, not made subject to the subsequent instalments, will bar only the equity of redemption of the mortgagor and subsequent purchasers and incumbrancers, and will not cut off the other instalments; and a subsequent foreclosure for another instalment would do nothing towards an adjustment of the respective interests of the parties; if each bid off the whole land, neither would become owner of any particular part thereof, or of any definite undivided interest therein, but each would still have a lien, which, though foreclosed as to those holding subordinate rights, would remain, as to the other, a mere lien; neither could redeem from the other, and neither would gain or lose precedence or position by the foreclosure sale.

Practice in supreme court: Costs. In this case, the decree below having been modified on appeal, each party being held to have been in error from the beginning, no costs were awarded to either party.

Submitted on briefs July 8. Decided July 15.

Appeal in Chancery from Shiawassee Circuit.

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S. B. Raynale, for complainant.

A. C. Baldwin, for defendants.

Cooley, J.

This case involves some novel questions under the statute for the foreclosure of mortgages by advertisement.

March 17, 1863, Henry Drum gave a mortgage to Eliza G. Clark, on lands in the county of Shiawassee, to secure the payment of a note for five hundred dollars, payable with interest in ten equal annual instalments; the first to be paid November 1, 1864. January 25, 1869, the mortgagee caused the premises to be advertised for sale under the power of sale contained in the mortgage, to satisfy the instalment which fell due November 1, 1868, and they were sold accordingly, and bid off by complainant McCurdy, for the instalment mentioned and the costs. Neither in the notice of sale, nor by any one at the time of the sale, does any thing appear to have been said about the instalments still to come due, and the whole land was sold. The instalment falling due November 1st, 1869, was not paid, and the mortgagee, through defendant Bowman, with whom she had left the mortgage to secure an advance, took proceedings in a like foreclosure for that instalment, and Bowman became purchaser. McCurdy then setting up a claim to the land discharged of any further lien by virtue of the mortgage, Bowman deemed it advisable to redeem from the sale to McCurdy, and paid to the register of deeds the amount of McCurdy's bid, with interest. McCurdy refused to receive this money, and filed his bill to enjoin the completion of Bowman's purchase, and to have that and the pretended redemption declared ineffectual. In the court below this bill has been sustained.

McCurdy insists that when a mortgage is foreclosed for one instalment, and others are to fall due upon it, a sale of the land for that instalment discharges it of the lien of the mortgage entirely, unless the sale is made expressly sub-

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ject to the other instalments. Bowman, on the other hand, argues that under the statute (*Comp. L.*, § *6913*) each of the instalments, after the one for which the land was sold to McCurdy, is to be deemed an independent mortgage upon the land, and as such, it is no more and no otherwise affected by the sale than if created by a separate instrument.

The statute referred to provides that, "In cases of mortgages given to secure the payment of money by instalments, each of the instalments mentioned in such mortgage after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such instalments may be foreclosed in the same manner and with the like effect as if such separate mortgages were given for each of such subsequent instalments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such instalment had been made upon an independent prior mortgage."

This statute was passed in consequence of the decision in *Kimmell v. Willard's Administrators, 1 Doug., Mich., 217*, in which it was held that a foreclosure under the power of sale for the satisfaction of one instalment, and a sale of the land therefor, forever disencumbered the land of the mortgage. It was intimated in that case, however, that while such would be the case generally, it was competent for the mortgagee foreclosing for one instalment, to make his sale subject to those falling due afterwards; and though in such case the lands would nevertheless at law be discharged of the mortgage, a court of equity would lend its aid to the mortgagee, and treat the land in the hands of the purchaser as charged with the subsequent instalments. Under the statute as it now stands, if sale is made subject to the subsequent instalments, there is no doubt that, both at law and in equity, they remain a lien on the land, not only as against the mortgagor, but also as against the purchaser at the prior foreclosure.

In this case, however, the mortgagee neglected to make the first sale subject to the subsequent instalments. Had

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the mortgagor redeemed, the case would have been fully covered by the statute, and no confusion could have arisen respecting the rights of the mortgagee and the purchaser under the foreclosure. The latter would have been entitled to the redemption moneys, and the former would have retained a lien upon the land for the instalments still to come due. But the mortgagor did not redeem, and the statute fails to give complete directions for the determination of the questions which arise.

Where several distinct payments are thus secured by one mortgage, no one of them has any preference over the rest in consequence of falling due sooner, but all have equal claims to be paid ratably out of the land.—*Cooper v. Ulman, Walk. Ch., 251; English v. Carney, 25 Mich., 178.* And if each may be treated as a separate mortgage for the purpose of a foreclosure under the power of sale, then it may be advisable to test the rights of the respective parties to this suit by supposing this mortgagee to have held two separate mortgages for the sums for which the sales to McCurdy and Bowman respectively were made. To make the case analogous, we must suppose the two mortgages to have borne the same date, and to have been executed, delivered and recorded together, so that neither could have any precedence of the other.

If one of these mortgages were then to pass into the hands of a third person, and he should foreclose it under the power of sale, it is obvious that this foreclosure could in no way affect the rights of the mortgagee as owner of the other. Neither of them having any precedence before, neither could have any afterwards. The foreclosure might take away the mortgagor's right of possession, if he failed to redeem, and it might bar the right of rememption of any subsequent purchaser or incumbrancer. As to the rights of the mortgagor and of such subsequent purchaser or incumbrancer, the mortgage foreclosed would be paramount, but it would not be paramount to one in respect to which it had no precedence. And it needs but little reflection, when

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the position of the respective owners of mortgages thus standing on an equality in respect to the lien is considered, to satisfy the mind that a foreclosure under the power of sale is entirely unsuited to the enforcement of the respective liens, or the adjustment of the respective interests.

It has already been remarked that if one party thus circumstanced forecloses by this process, the right of the other is not barred. A foreclosure under the power of sale by the other, afterwards, could do nothing towards an adjustment of their respective rights. If the whole land were bid in by each, neither would become owner of any particular part of the land, or of any definite undivided interest therein; but each would still have a lien, which, though foreclosed as to persons whose rights were subordinate, would remain a mere lien as to the other mortgagee, because his rights were not subordinate. For the same reason, neither could redeem from the other. As both parties would stand on an equality, if one could have the right to redeem, the other must have it also, while the moment one should exercise the right, the like right in the other would be gone, because his interest in the land would thereby be taken away,—in effect, purchased by the other,—and no one can redeem who has no interest in the land. Thus a practical exercise of the right to redeem would be a practical assertion and enjoyment of a superior right, and therefore inconsistent with the relative positions of equality. Moreover, the right of redemption, in the case of mortgagees, only exists for the purpose of enabling them to preserve or protect their liens, and in such a case it would not be necessary for that purpose, for the lien is not susceptible of being cut off by such a foreclosure of another lien which is not paramount, and therefore does not need the redemption.

What, then, is the position of a party who forecloses for one of several instalments owing upon his mortgage? If he is careful to sell subject to the other instalments, there is no difficulty, since the effect will be to charge the land,

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in the hands of the purchaser, with the payment of such subsequent instalments. But if he neglects to do this, while his foreclosure may have the effect to bar the equity of redemption of the mortgagor, and of subsequent purchasers and incumbrancers, as between him and the purchaser at his sale, the latter has become purchaser only of an instalment of the mortgage, and the remaining instalments still retain their relative positions; the one on which foreclosure has been had neither gaining nor losing precedence or position by that process, and the owner thereof having no greater or other rights than the mortgagee had in respect to it before, except as he may have acquired the right to possession by the failure to redeem on the part of the mortgagor and other parties whose rights were subject to the mortgage of which the instalment was a part. This must certainly be the result when the instalment on which the foreclosure is had, and the subsequent one, are owned by different parties, and we see no reason for a different conclusion where the ownership of both is in the same person. If the several instalments are to be treated as separate mortgages for the purposes of foreclosure, the fact of their being owned together or by different parties can be no more important than it would be in the case of distinct instruments.

It follows that both parties have been in error in respect to their several rights. McCurdy does not hold the land discharged of the lien of the subsequent instalments, but in his hands the land is liable for such instalments, and for the amount bid by him on the foreclosure, ratably in proportion to the respective amounts. On the other hand, Bowman had no right to redeem from the sale to McCurdy, and the defendant Clark could not have foreclosed, as against McCurdy's rights, under the power of sale. When, therefore, Bowman claimed to have redeemed from the sale to McCurdy, and asserted title to the land under the second foreclosure, McCurdy was entitled to relief against his claim.

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The decree in the court below was made on McCurdy's theory of the case, and was too broad. So far as it adjudged the attempted redemption to be void, it was correct; but in holding Bowman's purchase void, and directing him to release, it was erroneous. Bowman's purchase was equally good with McCurdy's, and each is on an equal footing as regards the land. The only advantage either has obtained regards the possession of the land, which McCurdy appears to have succeeded in obtaining, and of which we see no way of depriving him until further proceedings are had. And from the nature of the case, a court of equity alone is adequate to deal with liens thus circumstanced, and neither of the parties can foreclose the right of the other, except by suit in that court.

The decree should be modified in accordance with these views, and the cause remitted. And as each party has been in error from the beginning, we see no reason for awarding costs to either.

GRAVES, J., and CHRISTIANCY, CH. J., concurred.

CAMPBELL, J., did not sit in this case.

Leighton Richards v. George Tozer.

Practice in supreme court. It is incumbent upon a plaintiff in error, in order to reverse the judgment against him below, to show both that the rulings complained of are erroneous, and that he was prejudiced thereby.

Trover: Deed: Reservation: Logs: Removal. One who bases his right to recover in trover for a quantity of logs, upon an exception and reservation to himself in his conveyance of the land on which the logs were cut, of an undivided one-half of the pine timber with the right to enter and take it away before 1868, cannot recover without proof that the logs were taken away by him before the time limited.

Practice in supreme court: Errors that do not prejudice. And where in such a case there was no such proof, and the ruling and charge of the circuit judge was equivalent to a direction to find for the defendant upon other grounds, the

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judgment of the court below will not be reversed on error at the instance of the plaintiff, whether the rulings complained of were correct or not; for, on the whole case it appears that he was not entitled to a verdict in any event, and therefore the rulings to which he excepted did not prejudice him.

Heard July 8. Decided July 15.

Error to Lapeer Circuit.

W. Hemingway and *H. Geer*, for plaintiff in error.

J. M. Wattles and *A. C. Baldwin*, for defendant in error.

GRAVES, J.

The plaintiff in error brought trover for a quantity of pine saw logs cut and taken from the N. W. ¼ of the S. E. ¼ of section 2, in Deerfield, in Lapeer county. Verdict and judgment passing against him, he brought the case here on writ of error and bill of exceptions.

It seems that this lot in question was unoccupied, and the plaintiff, in order to establish his right to the logs, gave evidence that in 1862 he obtained a tax deed of the land for the taxes of 1860, and in December, 1863, quit-claimed to Nelson Newman, who held the patent title; that in and by this quit-claim he excepted and reserved to himself an undivided half of the pine timber, with the right to enter and take it away before 1868. He also gave evidence that the consideration for this quit-claim to Newman was this timber as reserved in the deed.

The plaintiff founded his right to the logs sued for, upon this provision in the quit-claim deed, and his whole claim rested ultimately upon it. The defendant was allowed, under objection, to show an oral purchase of the land and timber by him, of Newman, in 1868, and also to question the tax title of which Newman had taken an assignment through the quit-claim deed which contained the reservation in the plaintiff's favor. Besides this the court charged that the plaintiff was required to show, in order to recover, that he had title to the land, and also charged in substance

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that the defendant was in a situation which allowed him to show, and that he had shown, that the tax title was invalid. The effect of this charge was equivalent to a direction to find for the defendant.

The plaintiff objects to these rulings, and insists that they require this court to reverse the judgment. But at this stage of the inquiry we encounter another question, which is, whether, admitting that the court erred, it is made to appear that the plaintiff was prejudiced. Because, in order to reverse, there must not only be error, but one which was prejudicial. If he was not entitled to recover upon the showing made, if his case lacked some fundamental, some indispensable ingredient, then a charge to find against him was not only admissible, but proper, and incorrect rulings were not harmful to him in any legal sense. If the result reached by the jury was the only one which the law of the case admitted, he was not, in any view which the law takes, prejudiced by the rulings complained of. It was therefore incumbent upon the plaintiff on coming to this court, to so shape his case upon the record as to enable us to see that the court below not only erred, but erred to his prejudice; and in order to accomplish this it was requisite for him to so present matters that we might see that there was some ground upon which a verdict could have been given in his favor under correct rulings. Has this been done? His right to recover at all, or which is the same thing, his right to the logs, was rested by him on the passage in the quit-claim deed, and it is very clear that under and by force of that he was only entitled to take logs from the land before the year 1868, and by virtue of it could invest himself with no right to any by taking later.

From this it is evident that his right to a verdict upon any admissible view of his case depended upon proof in some way that the logs in question were taken by him before 1868.

Now we have examined the bill of exceptions very critically to discover some evidence that the logs in controversy

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were taken by the plaintiff within the time allowed, and that examination has not enabled us to discover any. On the contrary, the case, and course of counsel, rather favor the idea that these logs were taken by the defendant, and after the time limited by the exception in the quit-claim deed. We are, therefore, unable to say upon this record, as we find it framed, that the plaintiff suffered any prejudice by the different rulings objected to, though it be admitted that they were incorrect.

Under these circumstances we are constrained to affirm the judgment, with costs.

CHRISTIANCY, CH. J., and COOLEY, J., concurred.

CAMPBELL, J., did not sit in this case.

Edward B. Fisher v. Charles Kyle.

Evidence: Attorney's minutes. The minutes of an attorney in a cause, taken on the trial, when properly identified and their correctness proved, may be read in evidence to show, for the purpose of impeaching certain witnesses on a second trial, what they had testified to on a former trial.

Sunday: Taking prisoner to jail: Hiring horse: Contract. Taking a prisoner to jail on Sunday, under legal process, is a work of necessity; and hiring a horse for that purpose is not an illegal contract under the statute.

Trover: Hired Horse: Driving in excess of the contract. One who hires a horse for a specified journey, and drives it beyond what his contract contemplated, takes upon himself all the consequences of such additional driving, and if the horse dies while being so driven, he is liable in trover for its value.

Submitted on briefs July 8. Decided July 15.

Error to Oakland Circuit.

This was an action of trover, brought by Kyle against Fisher, to recover the value of a certain horse.

W. B. Jackson and *Charles Draper*, for plaintiff in error.

Crofoot & Brewer, for defendant in error.

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COOLEY, J.

We think the court erred in refusing to allow the witness Draper to read to the jury the minutes taken by him of the testimony of Kyle and Sawyer on a former trial. Draper was employed as attorney for Fisher in the former trial, and testified that as such he made minutes of the testimony of these witnesses, which he knew to be correct. He was then asked to read these minutes in evidence, but on objection, the court refused to permit it.

Had Draper testified to any present recollection of what these witnesses swore to, he would have been allowed to state what it was. But clearly his minutes, taken at the time, and which he swore were correct, were much less liable to err than any recollection he might have could possibly be. His minutes embodied his understanding of the evidence at the time, and would remain the same, and not become varied in the lapse of time; but his recollection, which would start with the same understanding, was constantly liable to be more or less perverted and changed, or, in material parts obliterated from the memory. It could not possibly, therefore, be more certain than the minutes, and as every variation from the minutes must render it more uncertain and unreliable, any rule of evidence which would admit the recollection and exclude the minutes must obviously be illogical and unsound. We approve, in this regard, of the case of *State v. Rawls, 2 N. & McC., 334*, and *Halsey v. Sinsebaugh, 15 N. Y., 486*, which we think lay down the true rule, and explain the origin of some misapprehensions regarding it.

Upon the principal question involved in the case we think no error was committed. Fisher hired a horse of Kyle to convey an officer who was taking a prisoner to jail on Sunday under legal process. The purpose must be regarded one of necessity, and the contract was consequently not made illegal by the statute. The distance is shown to have been sufficient for a day's journey, and was made in

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a single day; but Fisher then drove the horse further, on occasions of his own, and it fell dead in the course of the driving. This additional driving was tortious. It was not contemplated by the contract, and Fisher must take upon himself all the consequences. It is apparent that the question whether he would have been in like manner liable had the contract of hiring been illegal, does not arise, and consequently it would be improper for us to discuss it.

The judgment must be reversed, with costs, and a new trial ordered.

GRAVES, J., and CHRISTIANCY, CH. J., concurred.

CAMPBELL, J., did not sit in this case.

John P. Clark and another v. Lydia A. Raymond*.

Statute construed: Mechanic's liens: Jurisdiction: Pleadings: Petition: Answer: Admissions. In proceedings under the statute (*Comp. L. 1871, ch. 215,*) to enforce a mechanic's lien upon real property it is essential that every substantial requisite and every fact essential to jurisdiction should appear upon the record. It is essential to the creation of any lien under § 6789 of the statute, that the contract be made with the owner, part owner or lessee of the land; and a petition to enforce an alleged lien under that section which fails to allege that the respondent was either owner, part owner or lessee of the land upon which the lien is sought to be enforced, or to set out that he had any interest therein whatever, is fatally defective; and this defect would not be cured by an admission in the answer that the respondent was the owner of the land described in the petition; and especially not where this admission is coupled with an express denial that the work charged for by the petition was done or agreed to be done on that land.

Mechanic's liens: Dredging for a wharf. Whether dredging out a slip for a wharf and throwing the excavated dirt within the line of the proposed wharf and scraping the same back and leveling it off is such work as could be made the subject of a lien under the statute:—*Quære?*

Proceedings to enforce mechanic's lien: Evidence. When the alleged contract under which the work is claimed to have been done is an oral one, and its

*See *Clark v. Raymond, 26 Mich., 415,* and *Sess. L. 1873, pp. 119, 465.*

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terms are disputed, the lien will not be sustained unless the evidence of the petitioner is clear and decisive as to the real nature and terms of the actual contract, and so far preponderates as to satisfy the court without much hesitation of the correctness of his allegations; and the evidence in this case was not of that character.

Practice in supreme court: Costs. The fatal defect upon which the decree of the court below was reversed, being one appearing on the face of the petition, and to which the respondent made no objection in the court below, no costs were awarded to either party.

Heard July 8 and 10. Decided July 15.

Appeal from Bay Circuit, in proceedings to enforce a mechanic's lien under the statute.

The work for which the lien was sought to be enforced in this case, was dredging out a slip for a wharf or dock, and throwing the excavated dirt within the line of the proposed wharf, and scraping the same back and leveling it off.

Sutherland & Wheeler, for petitioners.

McDonell & Cobb, for respondent.

GRAVES, J.

This is an appeal from a decree made in the circuit court in a proceeding to enforce a lien upon real property under the provisions of *chapter 215, Comp. L. 1871.* Upon the service of the petition in March, 1871, and an order made thereon by the circuit judge requiring the respondent to answer within twenty days, and stating that in case of default the petition would be taken as confessed, she made her answer in due season. The parties thereupon proceeded to take their respective proofs, and in May, 1872, the court granted a decree in favor of the petitioners, and the respondent appealed. There is a good deal of evidence in the case, much of which is conflicting and contradictory, and several important questions have been raised, some of which are not free from difficulty. But the view we feel compelled to take of the case not only dispenses with any discussion of the generality of these questions, but

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presents the matter in an aspect which shows that they can not now be regularly subjected to discussion.

The statute under which these proceedings have been carried on is quite anomalous, and may easily be perverted to work great oppression and injustice.

It professes to establish a chancery remedy, but in many important particulars, and in regard to many very substantial matters, it departs widely and fundamentally from any course in equity hitherto known.

It assumes to confer upon the circuit courts and circuit judges very broad discretionary powers, and expressly declares that the proceedings shall be "summary." When the petition is exhibited the act declares that "the said court or judge thereof shall proceed to hear the matter in a summary manner, either in term or in vacation, as shall be directed by said court or judge in each case, from time to time; and every act, matter or thing which this chapter provides shall be done by the court, may be done by the judge thereof, in term or in vacation. Amendments to all proceedings and pleadings shall at all times be allowed for the furtherance of justice. If at any time during the progress of the proceedings it shall appear that any person interested has not had sufficient notice of any of said proceedings, the court may order such further notice as may be considered just and effectual."—§ *6794*.

In proceeding to administer such a law, it is indispensable to advance with care, and to see to it that every substantial requisite, and every fact essential to jurisdiction appears upon the record.

If the petitioners in this case ever acquired any lien, it was by force of the first section of the statute under which the petition was filed. They must therefore have been in the position, and the other party must have held the estate or interest there described, to give rise to any lien whatever. The statute declares the conditions on which the lien will arise, and the appearance of those conditions is indispensable to an assertion of the lien. The words of

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the statute are as follows: "Every person who shall, by contract, express or implied, with the owner or part owner or lessee of any piece of land, furnish labor or materials for constructing or repairing any building, wharf or appurtenances, or who shall construct, repair or put up any engine, machinery or appurtenances upon such land, shall have a lien therefor upon the said building, wharf, machinery and appurtenances, and the entire interest of said owner, part owner or lessee in and to the said land, not exceeding one quarter of a section, including such building, wharf, or machinery and appurtenances, or, if said land is within the limits of an incorporated city or village, on the lot or lots on which said building, wharf, machinery or appurtenances are situated, in the manner hereinafter provided, for the amount that may be due or to come due by virtue of said contract: *Provided* that no lien created by virtue of this act shall exceed the interest of the contracting party."—§ *6789.*

In order that there may be any lien under this statute there must be an express or implied contract with the owner, or part owner, or lessee of the land, and unless the party with whom the contract is made is either such owner, part owner, or lessee, no lien will arise or attach. The making a contract of the kind indicated, and its performance, will not suffice. There may be an express contract for building a wharf or any other of the enumerated structures, but it will not be the basis of any lien unless the party with whom it is made is the owner, part owner or lessee of the land, and a declaration or statement in a proceeding founded on the statute, that such a contract was made with a particular party, and subsequently fully performed, would not comprehend the substance of those facts which are involved in the idea of a lien under this law. Unless the interest of the contracting party in the land is in some way or form explained or manifested, an indispensable element is lacking.

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From the very nature of the case the particular interest of the respondent in the land must become a subject for investigation, and whenever it involves any material question of fact, such question, under the express provisions of the law, would be open to submission to a jury. An issue upon that interest ought surely to be tendered on the record by the petition.

In the case before us the petition sets up a verbal contract made on the 13th of November, 1869, by the petitioners with the respondent, for the performance of certain work, and alleges that the work was done on a parcel of land which is definitely described. It charges that there is due and owing upon the work about one thousand two hundred ninety-five dollars and ninety-seven cents, including interest at ten per cent. from the completion of the work. It also represents that the petitioners, in February, 1871, filed with the register of deeds a certificate verified by one of them, and containing the terms of the contract and a description of the premises, together with a statement of the amount due with all credits; that such certificate was recorded on the same day, and that on the 9th of February, 1871, a notice of the filing of said lien was served on the respondent.

The petition then prays that all and singular the interest of the respondent in the premises at the time the lien was created, or, in the language of the petition, "which she may hereafter acquire therein since that date," may be sold or otherwise disposed of "in pursuance of the statute in such case made and provided," and that the proceeds may be applied to satisfy the petitioners' said lien and their costs, and for general relief, etc.

Whether the respondent was owner, part owner, or lessee, or indeed had any interest in the land whatever, does not appear from the petition. The difficulty does not consist of a defective statement of matter, but in the total lack of matter. According to the view I entertain of the statute and of the nature of the proceeding which it authorizes, this defect

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is fatal. I think it was essential to the jurisdiction that enough should appear in the petition to indicate at least that the contractee had some interest in the land.

It may be contended that this defect in the petition was cured or obviated by the answer of the respondent, where she admitted that she was the owner of the land described in the petition.

I think the statute when properly considered will not justify any such conclusion. The petition is the first step in the proceedings in court, and the whole right to proceed depends upon whether that shows the existence of those main and substantial facts essential to the statutory lien, and such as to invest the court with authority to go on under the act. If no such case is presented, then there is no case to warrant the court in requiring an answer, and nothing of which it can rightly take cognizance. But if this were otherwise, I think the answer before us would not avail to aid the petitioners.

The statement therein contained would have to be taken in its entirety, and the same passage which contains the admission of ownership of the land specifically described in the petition, contains, coupled with it, an express denial that the work charged for by the petition was agreed to be done or was done on that land. This clog upon the admission would, I think, render it ineffectual to supply the omission in the petition, if that proceeding could be helped as to such a matter in that way.

The foregoing considerations are believed to be such as to require us to set aside the decree of the court below and dismiss the petition.

The result which has been reached makes it inappropriate to discuss the case upon the evidence, and supersedes the necessity of an examination of several questions which were argued on the hearing. Speaking for myself, however, I confess that I should feel much hesitation in holding that the kind of work done by the petitioners could be made the subject of a lien under this law.

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It is perhaps admissible to intimate that we feel less reluctance in disposing of the case upon the point which has been considered, since we are all inclined to think that upon the whole the evidence is not so clear and decisive as to the real nature and terms of the actual arrangement between the parties as it should be to warrant the founding of a decree upon it under the summary and very stringent provisions of this peculiar and unusual enactment. We are fully persuaded that when a party attempts to enforce a lien under this law, he should be held to make clear and satisfactory proof of the agreement upon which he bases his lien, and if the agreement is verbal, and the parties are wholly at variance in their evidence as to its substantial terms, as in this instance, the evidence of the petitioners ought to be so preponderant as to satisfy all reasonable and just minds without much hesitation of the correctness of their allegations.

In the disposition we feel compelled to make of the case, we think neither party should recover costs as against the other. The fatal defect in the proceedings, upon which we base our order, appeared on the face of the petition, and we do not discover that for this the respondent made any objection in the court below, as she might and should have done.

COOLEY, J., and CHRISTIANCY, Ch. J., concurred.

CAMPBELL, J., did not sit in this case.

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James Johnston v. J. Henry Whittemore and others.

Trover: Bailment: Wrongful determination: Conversion: Transfer. One who, upon separating from his wife, has placed in her possession, and for her separate use, and as her individual property, agreeing to pay the balance due therefor, an organ which he received under an agreement in writing, whereby he undertook to hold it in his possession as the property of another, of whom he was to purchase it, the organ in the meantime, and until fully paid for as therein provided, to remain the property and subject to the direction of the vendor, and which he had not yet paid for, thereby makes himself liable in trover to his vendor for the balance due on the contract, on the ground of a wrongful determination by him of the contract of bailment; such transfer to his wife would be as clearly a conversion as if sold to any other person for any consideration he might have agreed upon.

Replevin: Non-suit: Payment of judgment for value: Voluntary purchase. The fact that the plaintiffs in such a suit in trover had before brought replevin against defendant and wife for the organ in question, thereby getting possession thereof, and had suffered judgment for its value upon a non-suit to pass against them in favor of the wife, and had paid that judgment, would not affect the rights of the parties, and would not operate like a voluntary purchase by the plaintiffs of the wife.

Declaring void a special contract of sale: Possession. If the plaintiffs' in bringing this action, had proceeded upon the ground of declaring the sale and special contract void, under a provision authorizing this in case of default in any of the conditions therein stipulated to be performed, they could not recover, because they had not taken the necessary steps to rescind and place the defendant in *statu quo*.

Trover: Damages: Interest in the property. The plaintiffs are not entitled to recover the full value of the organ, nor beyond the balance due on the contract, which represented their entire interest in the property at the time of the conversion; and the provision in the contract authorizing them to retain payments made, as damages for non-performance, would not affect the extent of the recovery in this case, for that provision is attached to, and is a part of, and applies only to the clause providing for declaring the contract void and retaking the property upon that ground.

Stipulated damages. Such a provision is not one that could be enforced as for stipulated damages, as it is not based upon any idea of just and adequate compensation.

Practice in supreme court: Judgment: Costs. There being no dispute as to the facts, and the judgment being correct, except in the amount of damages, it is affirmed to the proper amount, with costs of the circuit to plaintiffs below, and reversed as to the excess, with costs of this court to plaintiff in error.

Heard July 10. Decided July 15.

Error to Alpena Circuit.

Sutherland & Wheeler, for plaintiff in error.

D. B. & H. M. Duffield, for defendants in error.

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CHRISTIANCY, CH. J.,

This was an action of trover, brought by defendants in error against Johnston (plaintiff in error) in the circuit court for the county of Alpena, to recover the value of a musical instrument, called an organ, which had been conditionally sold by the plaintiffs below to Johnston, on the terms stated in an agreement signed by him, of which the following is a copy:

"I hereby agree to hold in my possession one organ, valued at two hundred and twenty-five dollars, being the property of J. Henry Whittemore & Co., 179 Jefferson avenue, Detroit, which instrument I agree to purchase, and pay for the same, to the said J. Henry Whittemore & Co., or their order, at Alpena, the sum of one hundred and seventy-five dollars in two instalments, as follows: One note at two months from May 1st, and one note at nine months from May 1st, with ten per cent. interest added until paid, payable annually from date hereof on each instalment until paid;

"It being expressly understood and agreed that the said instrument is to remain the property of the said J. Henry Whittemore & Co., and subject to their direction, and not to be moved from place to place without their written assent, until the full amount shall have been paid, as above specified, at which time, and not till then, is the said instrument to be my property.

"It is further agreed, in case of default in any of the conditions above stipulated to be performed, that the said Whittemore & Co. may declare this agreement void, and take possession of the said instrument wherever it may be found, without legal process; and the payments that shall have been made may be retained to apply as damages for the non-performance of this agreement.

"I also agree to have the said instrument fully insured for the benefit of the said Whittemoree & Co., and that the policy will remain in their hands until the instrument is fully settled for.

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"Given this 29th day of April, in the year one thousand eight hundred and sixty-nine.

(Signed) "JAMES JOHNSTON."

Fifty dollars was paid down on the purchase of the instrument, which is not included in the notes mentioned, making the whole price two hundred and twenty-five dollars.

On the 14th of August, 1869, seventy-five dollars was paid and indorsed on Johnston's agreement, and the first note, which was for that amount, was given up. The other note for one hundred dollars has not been paid, nor any interest upon it.

About February 1st, 1870, Johnston and his wife separated, and Johnston (in the words of the record) "placed in her possession, and for her separate use, and as her individual property, the said organ, and agreed to pay the balance due therefor."

Afterwards, and prior to the 11th of May, 1870, the last note remaining unpaid, plaintiffs presented the note to Johnston and requested him to pay it, which he refused to do, saying he had let his wife have the organ, and she must pay for it. She was then requested to pay, and refused. And thereupon, on the 11th of May, 1870, plaintiffs commenced a suit in replevin against Johnston and his wife, and the property was taken on the writ and delivered to plaintiffs. Johnston did not appear in the replevin suit; but the wife appeared and put in a plea.

The case was brought on for trial August 2d, 1871; and after the jury were sworn, the plaintiffs (Whittemore & Co.,) submitted to a non-suit. The wife of Johnston, in whose possession the organ had been found, elected to take judgment for the value of the property, which being assessed at two hundred dollars, judgment was entered in her favor for that amount and costs, which plaintiffs paid.

The plaintiffs, after taking the property on the writ of

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replevin, and before the present action was brought, sold the organ for two hundred dollars.

There was no evidence before the jury in the present case that the plaintiffs ever declared void the articles of agreement signed by Johnston, nor that they ever offered to cancel the same, nor that they had ever offered to surrender up said unpaid note, nor that there was any demand made for the organ, except one which was made upon Johnston after the judgment in the replevin suit, and when plaintiffs had the property, if they had not already sold it. But the plaintiffs produced this unpaid note and the said agreement, on the trial, they having been left in their possession from the time they were made; and before the proofs in the case were closed, handed them to the court to be surrendered to the defendant, but he refused to accept them.

It was insisted on the part of the defendant below (plaintiff in error), and the court was requested to charge, that the defendant had a special property in, and the right of possession of, the organ, until, in consequence of his non-payment, or for default in his not performing some other part of the agreement, the plaintiffs should declare it void; that in order to declare it void effectually, they should, in some manner, signify to defendant that they no longer recognized the contract as in force, and offer to return the note which was unpaid; that until the agreement was thus declared void, the defendant had the right of possession, and plaintiffs could not maintain an action for the conversion of the property; that if plaintiffs could recover at all, they could only recover the balance remaining due on the contract and the note unpaid; and further, that the plaintiffs could, at all events, recover only nominal damages.

The court refused thus to charge; but did charge, that under the contract the organ remained the property of the plaintiffs while the purchase price was unpaid; but that defendant had a right of possession until default in making

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payment, and a right to acquire an absolute title by making the payment; that until the payment became due, defendant had a right to the possession of the organ, and plaintiffs could not retake it, if defendant kept the same in his possession; nor could the plaintiffs dispossess the defendant after default in making the payment, until they declared the contract void. But that there was something else in the case besides the duty of making the payment; that the transfer of the property to a third person was admitted; that this was a conversion which entitled the plaintiffs to maintain the suit, and was sufficient, though the plaintiffs did not declare the contract void, nor demand the property before suit. And there being no dispute upon the evidence, he told the jury to find a verdict for the plaintiffs for the value of the organ, with interest at seven per cent. from the first day of February, 1870, when the defendant turned over the organ to a third person.

We think this charge was substantially correct, except as to the amount of damages.

If the plaintiffs were in other respects entitled to maintain the action, which we shall presently consider, we think the act of defendant in assuming to transfer the property to his wife on separation, as her own separate property, and to give a good title, was in defiance of the owners' rights, and as clearly a conversion as if sold to any other person for any consideration he might have agreed upon.

It is not claimed upon either side that the plaintiffs by the replevin suit had put an end to the contract; and though, by that suit, they had obtained possession of the property, this was by the election of the party to whom the defendant had wrongfully transferred it, and they had been compelled to pay its full value and costs; and so far as the defendant's rights are concerned, the case, upon this point, stands upon the same ground as if the value had thus been paid to him for the property. But, as the replevin suit was not decided upon the merits, and under the somewhat harsh provisions of our statute, which, in case of a non-

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suit upon any informality, allows the defendant to elect to take judgment for the value of the property—a provision which, in justice, ought never to have been applied to such cases unless the plaintiffs refused to return the property, which operates as a trap, and makes a judgment of mere non-suit sometimes practically a final judgment,—we cannot give to this suit the effect between these parties of a voluntary purchase by the plaintiffs from Mrs. Johnston, nor is this effect claimed for it in this case.

It may be admitted for the purposes of this case, that if the plaintiffs, in bringing this action, had proceeded upon the ground of declaring the sale and special contract void, they could not recover, as they have failed to show that they have taken the necessary steps to rescind and place the defendant *in statu quo*. It is also true that they could not declare the special contract void, and proceed to take the property on that ground, except for "default in some of the conditions" therein "stipulated to be performed" by the defendant. And it is urged by the plaintiff in error that in order to maintain trover, the plaintiffs must have had the right of possession at the time of the conversion, and, by the contract itself, the only mode in which the plaintiffs could become entitled to the possession was by forfeiting or rescinding the contract, which had not been done, and that there was, therefore, no right of possession, and trover cannot be maintained.

But there are many cases in which it has been held, and as we think properly, that to maintain trover, it is not necessary that the right of possession should have existed one moment prior to the conversion, but may be given or spring out of the conversion itself; as when a bailee wrongfully repudiates and terminates the bailment of property in his possession under an agreement giving him the right to the possession, or the use of it, for a certain time, or on certain conditions, which agreement he has violated by the destruction or sale of the property, or its diversion to some use or purpose not allowed by the terms of the bailment. Such

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wrongful termination of the bailment or wrongful conversion restores to the bailor the right of possession, and the right to sustain an action of trover for the conversion. And yet the right of possession, in such cases, is given by the very act of conversion.—*Grant v. King, 14 Vt., 367; Bryant v. Wardell, 2 Exch., 479; Cooper v. Willomatt, 1 C. B., 672;* and see *Sanborn v. Colman, 6 N. H., 14; Swift v. Moseley, 10 Vt., 208,* and *Fenn v. Bittleston, 7 Exch., 152.*

But it is urged that, under this agreement, the plaintiffs could only obtain the right of possession by declaring the contract void, "for default" in some of the "conditions," thereby "stipulated to be performed." And if this wrongful termination of the contract, by sale or disposition of the organ, was one of the conditions referred to in this provision, there might possibly be some force in this objection, though we decide nothing upon that point. What are the "conditions" in this contract "to be performed by the defendant," and for default in which plaintiffs might declare the contract void, and take the property?

1st. That Johnston should hold possession of the property on the terms of the agreement;

2d. That it should not be moved from place to place without written assent [There is no evidence that it was moved at all); and,

3d. That he should pay as therein agreed.

These were all the "conditions" stipulated to be *performed* by him.

There was another provision of the contract, that the organ should remain the property of the plaintiffs until paid for; but this was not a provision which called for any thing to be *done* or *performed* by Johnston; it was simply the declaration of the principle upon which the contract was made, showing it to be a bailment, under which the defendant might acquire the property by performing the three conditions or stipulations above mentioned, and which were to be performed by him. The plaintiffs' right of possession does not depend upon the non-performance by the defend-

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ant of any of those enumerated conditions. But their right is that of bailors, to retake possession, or recover for its conversion, upon a wrongful determination by the defendant of the contract of bailment, beyond and independent of the conditions "stipulated to be performed by him." This right springs from the nature of the contract of bailment, and is given by the common law, and no stipulation of the contract has assumed to cut off or modify this common-law right. See *Fenn v. Bittleston*, above cited, which we think involves a similar principle.

But we think the court erred in instructing the jury to allow the whole value of the organ as damages. All the purchase price had been paid except the amount of the last note (one hundred dollars and interest); that represented their entire interest in the property at the time of the conversion.

The conclusion of the circuit judge was probably based upon the provision of the contract, that "the payments that shall have been made may be retained to apply as damages for the non-performance of this contract." This clause is connected with, and we think intended as a part of, the provision for declaring the contract void and retaking the property, and was intended to apply only to such a contingency; and the plaintiffs have not proceeded here upon that ground. What might have been the effect of such a provision in case the contract had been declared void, we need not decide; though it is clear such a provision is not one which the law would enforce, as for stipulated damages, as it is not based upon any idea of just and adequate compensation.

As there is no dispute about the facts, and it is evident from the record that the amount of damages the plaintiffs were entitled to recover was the amount of the unpaid note, with interest at ten per cent.; and the court having directed a verdict to the full amount of the value of the property, which was erroneous; the judgment is affirmed to the amount of the note, and interest to the date of the

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judgment, August 19th, 1872, being one hundred and thirty-three dollars, with the costs in the circuit court to the plaintiffs below, and reversed as to the excess, with costs to the plaintiff in error in this court.

COOLEY, and GRAVES JJ., concurred.

CAMPBELL, J., did not sit in this case.

William H. Johnson v. Hugh McKee.

Assault and battery: Declaration: Damages. A permanent bodily infirmity, caused or aggravated by an assault and battery, is properly provable under a declaration averring sickness and pain to have been caused by the assault, and needs no other or fuller averment. It can not be regarded as foreign to those averments.

Evidence: Statements of present feelings and sufferings. Statements of a suffering person concerning present feelings and sufferings, and not relations of past sufferings, are admissible in evidence. Such physical conditions as are not open to the sight or senses of others, cannot well be proved in any other way.—*Hyatt v. Adams, 16 Mich., 200,* referred to and followed.

Evidence: Cross-examination: Discretion. Where a physician, called by the plaintiff for the single purpose of describing his wound, which he had dressed, and who had been busy on the part of the defense, had been allowed, on cross-examination, to give full testimony concerning the physical and mental condition of plaintiff during his illness, was asked further, on cross-examination, the question: "What appeared to be the condition of his mind as to clearness and sprightliness during the time you attended him?" it was held its rejection was not an abuse of discretion.

Evidence: Subsequent desire to settle: Malice: Matter ex post facto. Proof of a subsequent desire to settle is not relevant upon the question of original liability, and does not disprove malice at the time of the assault.

Assault: Damages: Injured feelings: Mental anxiety: Provocation: Aggravated damages. A ruling that plaintiff could recover no damages for injured feelings or mental anxiety, if the assault was made on provocation, is not one which defendant could object to.

Charge to the jury: Justification: Error that does not prejudice. Where there was no evidence tending in any way to prove justification, it was improper to give any charge on the subject; but this was not an error against defendant.

Contradictory witnesses: Charge to the jury. When witnesses are contradictory, it is proper to caution the jury concerning the care to be used in considering the testimony.

Heard July 11. Decided July 15.

Error to Kalamazoo Circuit.

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May & Buck, for plaintiff in error.

Edwards & Sherwood, for defendant in error.

CAMPBELL, J.

McKee sued Johnson for an assault and battery, and recovered judgment against him, which is brought up on writ of error. The numerous assignments of error were classified on the argument under a few heads, and may be considered as substantially confined to those.

The battery consisted in striking McKee with a chair, whereby certain injuries were inflicted on his face and head, and in consequence of which he was seriously, and, as is claimed, permanently affected.

Among other results, there was evidence that he suffered from a urinary difficulty, caused or aggravated by the blow. It is claimed this injury was not within the terms of the declaration, and could not be shown without express averment.

If the evidence showed any such resulting injury, it showed it to have been as closely connected with the blow as any of the other evil consequences. It was a sickness produced by it in the same way as the swelling and soreness in the head and eyes, and the other grievances about which no question was made on the trial. The declaration charges sickness and pain to have been among the sufferings caused by means of the assault, and we do not think the rules of pleading require any more specific description than was given. We need not inquire how far it was requisite to go in declaring for consequences not necessarily following such an injury, because these consequences are very clearly set forth. When the defendant was informed that damages were sought for sickness and disorder, and their attendant expenses, as well as for wounds and bruises, he was bound to expect evidence of any sickness the origin or aggravation of which could be traced to the act complained of.

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A number of errors are alleged upon the reception of testimony showing the statements by plaintiff at various times concerning his pains and bodily sufferings. These are objected to as hearsay statements, and as declarations in his own favor.

So far as they were not narrations of past, as well as present, sufferings, it has been well settled that such statements of present feelings are facts which furnish the best, and often the only evidence of such physical conditions as are not open to discovery by the sight or other senses of witnesses.—*Hyatt v. Adams, 16 Mich., 200.* We have been unable to find in the record any question allowed by the court, asking for any other statements. There is one answer by a witness which might possibly be regarded as referring to past illness and sufferings, but the question to which exception was taken did not call for it, and no motion was made to strike out the reply. The court committed no error, therefore, whether the answer was or was not open to the construction complained of.

The physician who dressed the wound having been called by plaintiff to describe it, was cross-examined, not only as to what then took place, but also as to his subsequent attendance and treatment, and as to the plaintiff's general condition. He was allowed to testify that plaintiff was at no time unconscious or delirious. He was then asked further: "What appeared to be the condition of his mind as to clearness and sprightliness during the time you attended upon him?" This being objected to, was ruled out as not proper cross-examination.

If this had been material upon any thing in issue in the cause, we doubt whether it could have been properly rejected as not legitimate cross-examination. But as the witness had already been allowed to state all that could possibly have been essential as to the mental condition of the patient, we cannot see that the rejection of this was material. The same witness also stated there was nothing in the injury to prevent plaintiff from getting up the next

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morning, and every day. There was nothing in the case which, so far as we can discover, could have made an answer to the question material for defendant, and we need not determine whether the special ground of rejection was tenable. The same witness was called by defendant to establish his own defense, and was then examined as fully as he chose on the whole case, and stated that he had acted as defendant's agent in trying to get a settlement. The plaintiff might naturally object to examining him at large, although, as the physician who first saw the wound, he was compelled to call him to show its original appearance and condition. As the case stood, it was a question of discretion whether to receive or reject it.

Complaint is made that the court improperly excluded the testimony sought to be given by defendant himself, that he had endeavored to have an interview with plaintiff in regard to the affair, and that he voluntarily paid Dr. Fisk for his attendance. The object for which this testimony was offered was to disprove malice, and to mitigate damages.

This testimony could have no effect in disproving the intent and circumstances of the original attack. Upon that subject the proof of defendant, as well as of all the other witnesses, had been fully given, and he was allowed to state all that he had done and felt at the time. Matter *ex post facto* could not change the quality of that act. And no recovery was had or asked for any of Dr. Fisk's charges for medical services. This was expressly disclaimed, and the testimony was excluded because it could not, on any other basis, have any importance. It could not bear upon the original transaction, and was of no importance for any thing else.

Objection is also made that the court erred in not allowing proper force to provocation and to matter in justification.

In regard to provocation, the court charged, in effect, that if plaintiff provoked defendant, and the assault was

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the result of that provocation, he could recover nothing beyond his actual damages and outlays, and would be precluded from claiming any damages for injured feelings or mental anxiety. In other words, he would be cut off from all the aggravated damages allowed in cases of willful injury, and sometimes loosely called exemplary damages. As there is no case in which a party who is damaged, and is allowed to recover any thing substantial, cannot recover his actual damages, the rule laid down by the court was certainly quite liberal enough, and if any one could complain, it was not the defendant.

The whole discussion in regard to matter in justification should have been thrown out of the case. There was no testimony which could possibly tend to make out a justification. There was no fear or danger pretended, and the force used was not either in defense of person or property, or in an attempt to eject plaintiff from defendant's premises. There was no room for any charge on the subject.

The remarks of the court upon the caution to be used where witnesses disagree were entirely proper. As they referred to the fact that both plaintiff and defendant, as well as other witnesses, had testified concerning the same transaction, it can hardly be claimed that the statement that disagreements existed would be more damaging to one than to the other; and the record shows considerable discrepancies.

There is no error in the record, and the judgment should be affirmed, with costs.

The other Justices concurred.

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Michael Harrison v. Joseph Sager.

Justice of the peace: Judgment: Jurisdiction: Statute construed: Sunday. Under our statute (*Comp. L. 1871, § 5380*) a judgment of a justice of the peace, in a cause tried by him without a jury, rendered and entered in his docket on the fifth day after the trial, is void, even though the fourth day be Sunday; and is not the subject of a general appeal.—CAMPBELL, J., dissenting.

Construction of statutes adopted from those of other states. This statute having been adopted from the statutes of New York, is held to have been so adopted with the construction put upon it by the courts of that state, which is in accordance with the rule above stated.

Return construed: Presumption. The return of the justice to the appeal, setting forth that the cause was tried by him without a jury on the 12th, and that he rendered judgment on the 17th, it will not be presumed in support of the judgment, in the absence of any thing showing that to be the fact, that the cause was not finally submitted to him until the 18th.

Heard July 16. Decided July 17.

Error to Kalamazoo Circuit.

O. T. Tuthill, for plaintiff in error.

Edwards & Sherwood, for defendant in error.

CHRISTIANCY, CH. J.

This cause was brought to the circuit court on an appeal from a justice of the peace, and comes to this court by writ of error. A preliminary question arises upon a motion made in the circuit court by the plaintiff in error (who was defendant in the appeal), which was denied, to dismiss the appeal on the ground that it appeared from the justice's return to the appeal, that the judgment of the justice was rendered more than four days after the trial; that it was therefore a void judgment, and gave the circuit court no power to entertain the appeal, which is an ordinary appeal upon the merits, and not a special appeal in the nature of a *certiorari*.

The record states: "The said cause was then adjourned until the 12th day of October, 1870, at one o'clock in the

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afternoon, at which time the parties again appeared before me, and the cause was tried by me without a jury. After hearing the proofs and allegations in the cause, I take four days to deliberate on this matter. After due deliberation I decide, no cause of action, and on the 17th day of October, 1870, I render judgment against the plaintiff, the sum of ten dollars, costs of suit."

The statute (*Comp. L. 1871, § 5486, sub. 7*) requires the justice to enter upon his docket (among other things) "the time when a trial was had;" and by subdivision 10, of the same section, the time of rendering the judgment. By this return it appears the trial was had on the 12th of October, and the judgment rendered on the 17th.

Section 132 of the justice's act (*Comp. L. § 5380*) as to actions tried before him without a jury, as this was, provides that "he shall render judgment and enter the same in his docket, within four days after the same shall have been submitted to him for his final decision." The four days after the trial expired on the 16th, and the judgment was not rendered until the fifth day.

The counsel for the defendant in error does not claim that this statute is not mandatory. But he insists that the record does not show that the cause was submitted to the justice for his final decision on the twelfth, and that in support of the judgment we are bound to presume that though stated to be tried on the 12th, it was not submitted for decision until the next day. We cannot concur in this view of the record. When it states the trial was had on the 12th, we understand it to mean that the trial was closed and completed on that day, and it would be a forced presumption, in face of this language, to hold that the trial continued into the next day; such a presumption is negatived by the ordinary and natural meaning of the language.

But on reference to the calendar, it is found that the 16th day of October, 1870 (the last of the four days), was Sunday; and it is urged that the statute was intended to

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give the justice four days in all cases, to consider of his judgment; that Sunday ought, therefore, to be excluded. This, however, is not the language of the statute. It does not declare that the justice shall have four days to consider of his judgment, but requires him, at all events, to render and enter it on his docket *within* the four days.

If the statute required the judgment to be rendered on the fourth day, and it was not competent for him to render it upon the first, second or third, there would be strong reason for saying that Sunday should be excluded; but as it is just as competent for him to render the judgment on any other of the four days, there is no more reason for excluding Sunday because it happens to be the last, than if it happened to be one of the preceding three.

There is considerable conflict of authority in the several states, upon questions analogous to this. In England it would seem to be unsettled.—*Hughes v. Griffiths, 13 C. B. (N. S.), 324*, and *Reg. v. Justices, 7 Jurist, 396*, cited in *9 Exch., 731.* It is unnecessary to consider the decisions upon nearly analogous questions in the several states. This provision, like almost all others in reference to courts of justices of the peace, was borrowed from New York, and the practice and course of decision in that state upon this very provision are, therefore, entitled to controlling weight.

It seems to have been long and well settled there, that this provision in their statute includes Sunday as one of the four days; and when it happens to be the fourth day, the judgment will be void for want of jurisdiction if not rendered until Monday.

This was the rule laid down by Judge Cowen in his treatise upon justice's courts, a work always recognised as of the highest authority for the last forty years and more, not only in the state of New York but in this state.—See *Bissell v. Bissell, 11 Barb., 96*, where this and the other New York authorities are cited.

Our own legislature, in adopting our own justice's act

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mainly from the state of New York, it is but reasonable to suppose, intended to adopt it with the settled construction there given it.

We think the judgment of the justice in the present case must be considered void; that it was not a proper subject of a general appeal upon the merits, and gave the court no jurisdiction to try the case upon appeal. The motion to dismiss should have been granted, and the judgment rendered upon appeal must be reversed, with costs.

GRAVES and COOLEY, JJ., concurred.

CAMPBELL, J.

I think the design of the statute was to allow the justice four acting days, in any of which it would be lawful for him to do judicial acts. To include Sunday is to limit him to three judicial days, and to raise a distinction which gives him more time in some cases than in others, which is not, I think, a conclusion to be favored. It was held in *Hughes v. Griffiths, 13 C. B., N. S., 824*, that where action is to be had by a court, days not judicial are not to be included in the time limited for such action. I think this decision correct and applicable, and preferable to the more technical holding.

I think the judgment was rendered in time.

The Brig "City of Erie" v. John Canfield and another.

Water craft: Statute construed: Admiralty jurisdiction. The statute (*Comp. L. 1871, ch. 210*) providing for the collection of demands against water craft was intended to give a remedy in all cases coming within its provisions in other particulars, where the vessel at the time was navigating the waters of the state, and where no remedy could be had in admiralty, and is not confined to water craft used or intended to be used exclusively in navigating the waters of this state; and the fact that the vessel was upon a voyage from a port outside the state would be of no importance, except as it bore upon the question of admiralty jurisdiction.

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BRIG "CITY OF ERIE" v. CANFIELD.

Boom: Navigable waters: Nuisance: Floatage of logs: Public use of stream. The fact that a boom in the Manistee river embraced a portion of the navigable waters capable of being navigated by large vessels, does not necessarily constitute it a nuisance which may be abated by force; in any rules laid down for the public use of such a stream, the necessity and convenience of the floatage of logs, and the need of booming facilities to render that floatage of value, must be considered.

Boom: Impediment to navigation: Question of fact. Upon the question whether the boom in this case was an unnecessary impediment to navigation, the circuit judge having examined the question elaborately, and reached the conclusion that it was not, and the evidence on which he acted not being returned, and the question being a complicated one, depending upon the particular facts, and the necessities and conveniences of the respective interests, which the circuit judge was in a position to consider and compare, and which this court is not, his conclusion is adopted as correct.

Boom: Riparian rights: Admiralty jurisdiction. The boom in this case being a structure pertaining to the adjacent land, as much as a wharf or building erected thereon, and assuming that it extended no farther out than the land owner, with due regard to navigation, might properly extend it, a wrongful injury to it would not be a marine injury, and could not be redressed in a court of admiralty.

Heard January 14. Decided July 22.

Certiorari to Manistee Circuit.

S. W. Fowler, for plaintiff in *certiorari*.

Ramsdell & Benedict, for defendants in *certiorari*.

COOLEY, J.

This case is brought into the court by *certiorari* to the circuit court for the county of Manistee.

In the court below the defendants in error were complainants, and proceeded against the brig under the act to provide for the collection of demands against water craft, approved February 5th, 1864.—*Laws 1864, p. 107; Comp. L. 1871, p. 1861.* The demand set forth in their complaint was that the brig, on the fifth day of June, 1868, "while navigating the waters of the state of Michigan, at the port of Manistee, in the county of Manistee aforesaid, in the employment and business of commerce and navigation between the port of Manistee and the port of Chicago, in the state of Illinois, upon the lakes and navigable waters connecting said lakes, by reason of the misconduct and neg-

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ligence of the master and employes of said brig, and by reason of lack of skill, care and attention in the management of said brig by said master and employes, and by reason of the insufficiency and unseaworthiness of the rudder of said brig, was deflected and turned from its due and proper course, into and against the boom, and into and against the saw-logs of complainants, whereby said boom was broken, and said saw-logs were released, scattered, damaged and lost, to the number of about six hundred logs." The case was contested on both the law and the facts, in the circuit court, but the claim was sustained, and a judgment rendered in favor of complainant for six hundred and eighty-four dollars.

In this court the cause was argued on jurisdictional questions only. It is claimed that the cause was within the admiralty jurisdiction of the federal courts, and, consequently, that no state court could have or be vested with jurisdiction of the same. Also that the case was not within the act above referred to, which only authorizes proceedings against water craft "used or intended to be used in navigating the waters of this state;" whereas, the vessel in question was navigating the waters of both Michigan and Illinois. And further, that the evidence shows that the boom in question extended into, and embraced a considerable portion of the navigable part of the Manistee river at the point where the injury occurred, and was placed there by complainants without authority of law, and constituted a public nuisance, and an injury to, or destruction of it could give no claim to compensation.

The fact the brig was upon a voyage from a port outside the state seems to me unimportant, except as it may bear upon the question of admiralty jurisdiction. The act referred to was unquestionably intended to give a remedy in all cases coming within its provisions in other particulars, where the vessel at the time was navigating the waters of the state, and where no remedy could be had in admiralty. The act is not confined to water craft used or

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intended to be used exclusively in navigating the waters of this state, and the brig in question was in this particular strictly within the terms of the act, and if there is no admiralty jurisdiction, is within the reason for its enactment, notwithstanding a part of its voyage was upon the waters of another state.

The fact that the boom embraced a portion of the navigable waters of the Manistee river, capable of being navigated by vessels like this, does not necessarily constitute it a nuisance which may be abated by force. It appears by a map which is in evidence by stipulation, that the boom is in the river between Manistee City (then a considerable village) and the lake, and it would seem from the judge's opinion, which is returned, that considerable evidence was taken to show its necessity, and whether it did or did not constitute an unnecessary impediment to navigation. The circuit judge examined this question elaborately, and reached the conclusion that it did not. The evidence on which he acted is not returned, and the correctness of his conclusion on its weight and credibility has not been argued. It is clear that on a river like the Manistee, which is navigable by steamers for a long distance, but down which logs by the million are floated and gathered in booms every season—where, in fact the principal industry consists in cutting, floating, and manufacturing into lumber the forests in its vicinity, and where the river is more valuable for this floatage than for any other navigation; the necessity and convenience of this floatage must be considered in any rules laid down for the public use of the stream, and the need of booming facilities to render the floatage of value. Indeed, to take away the privilege of booming would be to strike a fatal blow at the principal commerce on the stream; for the vessels which ply between Manistee and other ports are loaded principally with the lumber which the mills along the shores of Manistee lake and river are enabled, by means of the privilege of floating and booming logs upon these waters, to manufacture and place upon the market.

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It is just and reasonable, therefore, and conducive to the best interests of commerce, that the right of navigating the river should be exercised with due regard to the necessity for booming facilities, and the former is not so far paramount as to render the latter a nuisance whenever and wherever it encroaches upon waters navigable by the large vessels which enter this stream. The question whether a nuisance or not, is complicated; it must depend in any case upon the particular facts, and the necessities and convenience of each interest must be considered and compared before the proper conclusion can be reached. The circuit judge was in position to do this, but we are not. In his opinion the boom is spoken of as having been in existence for eighteen years, and it is fair to presume that persons navigating the stream would long since have taken steps for its removal if they found it more an impediment than an aid to the commerce thereon.

If we are correct so far, we do not see how there can have been jurisdiction in admiralty for the negligence complained of. The tort consisted in an injury to a structure which pertained to the adjacent land just as much as a wharf or a building erected thereon would have done. It must be assumed on this record, where we cannot review the facts, to have extended no farther out than the land owner, with due regard to navigation, might properly extend it. If this is so, a wrongful injury to it would not be a marine injury, and could not be redressed in the court of admiralty. And in this view the extent or point of commencement of the voyage would be immaterial.

The proceedings must be affirmed, with costs.

GRAVES, J., and CHRISTIANCY, CH. J., concurred.

CAMPBELL, J.

I regard the statute in question as designed to authorize proceedings analogous to those in admiralty, and to cre-

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ate a lien not enforceable in any other way. It seems to me to come clearly within the cases cited on the argument, in which the supreme court of the United States has held such legislation invalid, as well as against those which hold that vessels enrolled and licensed for the coasting trade cannot be subjected by state legislation to liabilities and burdens which shall affect the title, or charge the vessel as such, and not through its owners.

I think the proceedings void.

Nathan C. Carter v. George Snyder.

Practice in circuit courts: Set-off: Costs. Where the only defense set up to an action of assumpsit is a settlement, and that subsequently defendant did work for plaintiff to the amount of twenty-one dollars, and the court instructs the jury that if they find the settlement sustained they should throw out all matters upon either side that entered into that settlement, and then find a balance one way or the other as to the items of deal after the settlement, and the jury find a verdict for plaintiff for only twenty-five dollars, it cannot be said that the plaintiff is entitled to full costs on the ground that he established a claim of one hundred dollars which was reduced by set off.

Bill of exceptions: Testimony: Presumption. It will not be presumed that the bill of exceptions does not contain all the evidence, where the form and wording of it indicates that the whole testimony of each witness is given verbatim and it concludes with the recital that "the evidence was here closed."

Heard July 15. Decided July 23.

Error to Ionia Circuit.

Lemuel Clute, for plaintiff in error.

W. W. Mitchel, for defendant in error.

GRAVES, J.

Snyder sued Carter upon the common counts, and added a special count for damages for failure to saw some logs for

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him. Carter pleaded the general issue and appended a notice of set-off.

On the trial Snyder gave some evidence that in the fall of 1868 he left some logs at Carter's mill, which the latter agreed to saw, and afterwards refused to do so. He also gave some evidence that he sold Carter a pair of mules, and paid him sixty-three dollars in money, and further, that Carter had the benefit of a few logs belonging to him, and also agreed to deduct fifty cents per thousand for some sawing. Carter gave evidence that all matters were settled between the parties in the fall of 1868, and he also claimed that Snyder owed him twenty-one dollars for sawing done afterwards.

The court instructed the jury that if they found the settlement sustained by the testimony, they should throw out all matters upon either side that entered into that settlement, and then find a balance either one way or the other upon the testimony as to the items of deal after the settlement. The jury found a verdict for the plaintiff for twenty-five dollars.

Snyder then claimed to be allowed full costs, on the alleged ground that his demand as established on the trial exceeded one hundred dollars, and was reduced by set off. Carter opposed this, and insisted that the evidence on his side as to dealings with the plaintiff, except what was said as to a matter of about twenty-one dollars, was given exclusively to prove a settlement, and not as a counter claim, and that upon the evidence, and as the case must have been understood by the jury, there was no ground for saying that the plaintiff established a claim of one hundred dollars. He contended that he was entitled to costs. The court gave judgment, however, in favor of Snyder, for full costs, and Carter asks that this be corrected.

The record, we think, shows pretty plainly that the amount established on the trial in Snyder's favor was considerably below one hundred dollars, and did not go above some forty-six dollars. His claim, as nominally made, did,

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indeed, extend further, but as the only matter of set-off was limited to twenty-one dollars, and under the charge the jury must have found that there was no subsisting demand which would entitle Snyder to more than twenty-five dollars, after deducting the set-off of twenty-one dollars, there is no room for saying that a claim for above one hundred dollars was established, and reduced below that sum by set-off.

It was said in argument that it did not appear that all the evidence was returned, and that, to support the judgment, we ought to intend that sufficient circumstances were shown. This is well enough answered by saying that we do not concur in this representation of the state of the record. We think it does appear that all the evidence is returned. The frame work of the bill of exceptions, and the whole verbiage, indicate that the whole testimony of each witness is given *verbatim*, and that all evidence is included. And the recital at the end of the proofs, "that the evidence was here closed," confirms this view. We think the court was mistaken in allowing costs to Snyder. They should have been given to the other side.

The judgment below, as to costs, must be reversed, and Carter must have judgment here for his costs in both courts.

The other Justices concurred.

The People v. Jacob R. Chappell.

Statute construed: Careless use of fire-arms: Malice. A prosecution under "An act to prevent the careless use of fire-arms" (*Comp. L.*, § 7550), can not be had, and there can be no lawful conviction under it, where the use is not careless, but intended and malicious.

In such prosecutions the absence of malice is a statutory requisite, and no statutory ingredient of any offense can be disregarded. If lacking, the offense cannot exist.—*Koster v. People, 8 Mich., 431.*

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PEOPLE v. CHAPPELL.

Statute construed: Felony: Misdemeanor. The statutory provision (*Comp. L.*, § *7919*) that no person shall be acquitted of a misdemeanor because the proofs show a felony, cannot apply to a statutory offense where the misdemeanor could not be included in any felony, and where the offense proved would be inconsistent with that charged, instead of being an aggravation of it.

Practice in criminal cases: Nolle prosequi. Where the whole facts proved went to negative the offense charged, and there was nothing tending to sustain it, the certificate sent down in answer to the exceptions directed a *nolle prosequi*.

Heard July 15. Decided July 22.

Exceptions from Saginaw Circuit.

Byron D. Ball, Attorney General, for the People.

Wisner & Draper, for respondent.

CAMPBELL, J.

Respondent was convicted under an information charging him with maiming one Daniel Forrest by discharging a loaded pistol, pointed and aimed intentionally, but without malice.

Upon the trial the testimony tended to show that the weapon was used either in self defense (which was indicated by strong proofs), or with a criminal intent, and maliciously. The court, among other things, was asked to charge that if the act was done with malice, the defendant could not be convicted under the information. This was refused, and the court said, in response to the request: "I refuse so to charge you. The respondent, in a case of this kind, and in this case, cannot ask an acquittal because he is shown to have been guilty of a crime of a higher grade than that charged. It is fortunate for him, if he is guilty, that the people have not charged him with as high a grade of crime as they might have done."

The statutory offense with which he was charged was under section 3 of "An act to prevent the careless use of fire-arms."—*Comp. L.*, § *7550*. The statute was designed to punish a class of acts done carelessly, but without any design of doing mischief, and the various sections must, under our constitution, be construed so as to conform to the title. The absence of malice is as necessary an ingre-

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dient in the statutory definition as the use of fire-arms. And the offense is purely statutory.

It is a rule of statutory construction that no conviction can lawfully be had under a charge of a statutory offense if any of the named qualifications are not proven.—*Koster v. People, 8 Mich., 431.* This rule is well settled, and can not be departed from without a plain violation of the legislative enactment. The penalty prescribed can only be imposed on offenders who have come within the prohibition. If their acts are of another nature, they must be charged according to the facts, and not in contradiction to them.

The provision in *section 7919 of the Compiled Laws,* that no person shall be acquitted of a misdemeanor because the facts prove a felony, can have no application to any case where the offense proven would be directly contradictory of a statutory provision. The cases to which this rule applies are usually those where a felony includes a misdemeanor, and is made up of the lesser offense, with some additional, but not contradictory element, so that there is no variance in the proofs. But it is manifestly impossible for an act to be at the same time malicious and free from malice. The statute, as before stated, was aimed at acts where no harm was designed, and proof of malice is not merely proof of something beyond the statute. It is inconsistent with the statute in its chief design.

The ruling was erroneous, and the conviction cannot be maintained. Upon the facts shown, which had no tendency to make out the statutory charge, the defendant should have been acquitted.

The conviction must be set aside, and vacated. As the facts all show without contradiction that the respondent cannot have been guilty under the statute, the prosecution should not be further pressed. It is not desirable, therefore, to discuss the questions raised upon the charge. Let it be certified to the circuit court that the verdict should be set aside, and a *nolle prosequi* entered.

The other Justices concurred.

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Nehemiah M. Bennett v. Henry V. Libhart.

Identity of person: Family name: Initials: Presumption. It will not be assumed as a legal presumption that where the family name and initials are the same, there is identity of person; and therefore Henry V. Libhart is not entitled to recover in an action upon a judgment in favor of H. V. Libhart, without any proof of his identity with the plaintiff in such judgment, and in the absence of any averment in his declaration that he was known by the latter name, or that the judgment was rendered in his favor by that name.

Evidence. The fact that the judgment was received in evidence by consent, does not preclude the defendant from raising this point; for proof of the judgment was only one of the steps necessary to make out a case, and should have been followed up by proof of identity of parties.

Heard July 15. Decided July 22.

Error to Ionia Circuit.

John S. Bennett, for plaintiff in error.

John Toan, for defendant in error.

COOLEY, J.

Libhart sued Bennett before a justice of the peace, and declared on a judgment rendered in his favor before another justice of the peace. Bennett pleaded the general issue. When the cause came on for trial, Libhart produced the docket containing the entry of the judgment on which he claimed to recover, and it was received in evidence by consent. The judgment, however, purported to be in favor of H. V. Libhart, and there was no averment in the declaration that the plaintiff was known by that name, or that such judgment was rendered in favor of the plaintiff by that name, nor was any evidence given of the identity of the plaintiff with the party in whose favor the judgment was rendered. The justice nevertheless gave judgment in his favor, which has been affirmed in the circuit court.

Had Libhart sued upon a note or other written contract made payable to H. V. Libhart, the possession of the writing by him would have been some evidence that he was

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the party mentioned therein. But there is no room for a similar presumption in the case of the record of a judgment, upon which one man can bring suit with the same facility as another, if he will make the averment of identity with the party plaintiff. We have, therefore, nothing in this case to support the judgment, unless we are at liberty to assume, as a legal presumption, that where the family name and initials are the same, there is identity of person. This is going farther than we think is admissible.

It is suggested that the fact that the judgment was received in evidence by consent, should preclude the defendant from disputing the right to a recovery upon it; but this is clearly not so. Proof of the judgment was only one of the steps necessary in making out a case; it should have been followed by the further proof that the plaintiff was in fact the party to the first suit.

We regret the necessity of deciding a case on such a ground, but cannot avoid it if the plaintiff fails to make out so obvious a point in his case.

The judgment must be reversed, with costs of all the courts.

The other Justices concurred.

Samuel F. Hersey v. The Huron Salt & Lumber Manufacturing Co.

Contract construed: Distribution of proceeds of sales. The contract in this case, for the cutting, running and delivery of certain logs by the first party, and for the advancing of money therefor, and the sawing and manufacturing of the same into lumber, and the shipping and sale thereof by the second party, and for the distribution of the proceeds, is construed to intend that the deductions therein provided for on account of advances made, charges, freight, insurance, etc., were to be taken from the gross undivided proceeds of sales, and not from the share of the second party alone.

Heard July 15 and 16. Decided July 22.

Error to Saginaw Circuit.

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HERSEY v. HURON SALT AND LUMBER MANUFACTURING CO.

This suit was brought by Hersey, assignee of Buck, Hollihan & Co., upon the following contract:

"Agreement between Buck, Hollihan & Co. and The Huron Salt & Lumber Manufacturing Company. This agreement, made this 15th day of February, A. D. 1867, between Buck, Hollihan & Co., of East Saginaw, Michigan, parties of the first part, and The Huron Salt & Lumber Manufacturing Company, Salzburg, Bay county, Michigan, parties of the second part, witnesseth:

"The first parties hereby sell and agree to sell to the second party all the logs now cut and banked on the Tobacco river, in town 17 north, range 3 west, and marked 17 * 3, and also agree to sell and deliver to the second party all the logs they shall cut and bank as aforesaid, during the present winter, to be marked 'CH.'

"The above logs have been cut and are to be cut on lands bought by the first parties of George S. Frost, of Detroit, and now held under contract of purchase.

"The first parties hereby further sell and deliver to the second parties all the logs now on the bank and marked 'Q,' being all the logs so marked and cut by Cross & Marshall, on the Chippewa river, and agree to sell and deliver to the second parties all the logs that shall be cut on the Chippewa river this winter by said Cross & Marshall, and all the logs to be cut shall be marked 'CH.'

"The first parties further hereby sell to the second parties all the logs now cut and banked on the Tittabawassee river, in town 6 north, of range 1 east, by Charles Townsend, and marked 'C. W. T.,' and agree to sell and deliver to the second parties all the logs that shall be cut this winter by said Charles Townsend in the last mentioned town, the logs so to be cut to be marked 'CH.'

"The first parties further agree that all the said logs shall be of the usual lengths for making pine lumber, shall be well manufactured, and shall scale at least six million feet, and they guarantee that all said logs cut and to be cut shall make lumber that will run at least thirty per

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cent. of the three upper qualities; that as early in the spring of this year as the water will permit, they will run to the Tittabawassee boom and deliver in the boom of the mill of the second party, as fast as they are wanted for sawing, at least six million feet of the quality above mentioned.

"It is mutually understood and agreed that the undivided one-half of the logs now cut shall be and become the absolute property of the second party when this contract is signed, and that the undivided one-half of the said logs to be cut and banked shall be and become the absolute property of the second party as and when the same are banked and marked as aforesaid; and that the second party shall have the exclusive possession and right of possession of and lien on all said logs cut and to be cut and banked, and of the lumber made therefrom, until said lumber is shipped, as hereinafter provided; and that neither party will sell, use, dispose of, mortgage, pledge, or in any manner incumber said logs or any part thereof, or contract so to do, except in the manner in this contract mentioned, and that from the purchase price, as hereinafter mentioned, there shall be deducted, to be paid to the second parties, or retained by them out of the proceeds of all the lumber, twenty-eight cents per thousand feet for each one per cent. that all of said logs shall fall short of the quality herein before mentioned and guaranteed; and there shall be paid to the first parties, in addition to eight dollars a thousand, twenty-eight cents per thousand feet for every one per cent. that all said logs shall exceed the quality above guaranteed.

"The second parties agree to take said logs at their said mill boom, and manufacture the same into lumber in a workmanlike manner, and so as to be of the most profit to both parties, to pile said lumber on their mill dock in a good and workmanlike manner and convenient for shipment.

"They further agree to ship all the lumber made from

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said logs as fast as practicable to Chicago, and there pile and keep the same for sale in the most economical manner, the lumber to be shipped to Chicago in the name of the second parties: *Provided*, That sales of lumber may be made from the yard or afloat, as may be the most profitable.

"The second party further agree to pay to the first party for one-half the logs above sold and agreed to be delivered, eight dollars per thousand feet, with the addition or deduction for variation in quality, as above mentioned; and as said second party has made certain advances on said logs, and more advances are required to enable the first parties to carry out their part of this agreement, the second parties hereby agree to advance to the first parties, from time to time, as required by them for the purpose of getting out and delivering said logs in said mill boom, for payment on the said land contracted from said Frost, on paying said Frost any lien he may have on said logs by his said land contract, or permission given to cut logs: *Provided*, The advances hereinafter to be made shall not exceed in all the sum of eleven thousand dollars on four million feet of logs to be hereinafter put in the river, or in that proportion as fast as said logs are put in.

"It is further understood and agreed that when said lumber shall reach Chicago, the first parties may and shall have the right to dispose of their interest in the lumber at Chicago, or any part thereof, subject to the lien thereon of the second party, which is hereby given for the fulfillment of this contract, saw bill, advances and liabilities incurred by or for rents or other acts or expenses to carry out the manufacture, shipment or sale of the lumber under this contract, and they accounting and paying over to said second parties any sum found due them on final settlement under this contract. It is further mutually agreed that the lumber from said logs shall be inspected and measured as and when shipped, and the inspection bills shall be the

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basis of settlement, and binding and conclusive upon both parties, both as to quality and quantity.

"The proceeds of the sales of said lumber shall be disposed of as follows: First shall be deducted the inspection, freight, insurance, dockage, commissions and other charges actually and necessarily incurred and paid in the shipping and selling of said lumber. Then there shall be paid to the second parties all advances heretofore made, or that shall be made by the second parties, with ten per cent. interest from the time the same were made respectively to the time of settlement. Then there shall be paid to the first parties eight dollars per thousand on one-half of said lumber, with the addition to or deduction from the sum provided for above in case of variation from thirty per cent. of the three upper qualities. Then there shall be paid to the second parties the sum of four dollars per thousand feet on one-half of the lumber sawed, for saw bill, and the balance of the proceeds, if any, shall be divided equally between the parties, share and share alike: *Provided*, That if there shall not be enough of the proceeds to make the payments above specified, then the deficiency shall come out of the payment for one-half of the logs and payment for saw bill in proportion to the sum above mentioned. In witness whereof the parties have hereunto set their hands the day and year first above written."

The case was referred, and the report of the referee was confirmed, and judgment rendered in favor of plaintiff for four hundred and five dollars and ninety-six cents. The plaintiff filed exceptions to the referee's report, and brings the case up on error.

The main question raised was upon the construction of the last paragraph of the contract, as to the distribution of the proceeds of sales of lumber. The plaintiff claimed that the deductions for charges, advances, etc., were to be taken from the gross undivided proceeds; and the defendant, that they were to be taken from the share of the plaintiff's

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assignors, Buck, Hollihan & Co. The referee found according to the defendant's construction.

William A. Clark and *Ashley Pond*, for plaintiff in error.

McDonell & Cobb and *Gaylord & Hanchett*, for defendant in error.

COOLEY, J.

We are all of opinion that the plaintiff's construction of the contract in suit was the correct one. The court should have sustained the exceptions to the referee's report, so far as they related to his computation of the amount due, and should have rendered judgment in favor of plaintiff, for five thousand four hundred and sixty-four dollars and sixty-one cents, with interest from October 5th, 1867. The amount at this date is, seven thousand six hundred and eighty-two dollars and ten cents, and the judgment in the court below will be set aside and vacated, and judgment entered in this court for the above sum, and the costs of both courts.

The other Justices concurred.

Daniel Carney v. Owen O'Neil.

Declaration: Money paid to use of defendant: Special contract: Covenant against incumbrances. One who has voluntarily paid a mortgage upon land conveyed to him by a deed containing a covenant against encumbrances, cannot recover the amount thereof of his grantor upon the general count for money paid to his use; where there is a special contract between the parties, there can be no recovery upon a general count for money paid to the use of defendant, except in cases, where there could have been a recovery in the absence of any special contract.

Heard July 16. Decided July 22.

Error to Kalamazoo Circuit.

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William Fletcher, for plaintiff in error.

Robert F. Hill, for defendant in error.

GRAVES, J.

Carney sued O'Neil before a justice, upon the common count for money paid to his use, and O'Neil pleaded the general issue. In order to establish his cause of action Carney was allowed, under objection, to put in evidence a deed to himself from O'Neil and wife, conveying a farm, and containing a covenant against incumbrances, and also a prior mortgage upon the farm, given by O'Neil to one Hayden to secure eighty-five dollars and interest, and which, by the terms of the mortgage, O'Neil was at liberty to pay in money on or before the first day of December, 1863, or in lieu thereof, in ditching eighty-five rods on such parts or places of two specified sections as Hayden should direct. Carney then testified that before suit he paid to the holder of the mortgage the amount called for by it, less about forty dollars, which had been paid before, and that he had never been requested by O'Neil to make such payment, and had never been promised repayment by him. On this showing the justice gave judgment in favor of Carney, and the court below reversed the judgment, on *certiorari*. The case is now brought here on writ of error to reverse the judgment of the circuit court.

We think the judgment of the court below was correct.

The covenant against incumbrances contained in the deed was not mere matter of inducement or explanation, but was the foundation and gist of the plaintiff's claim. His cause of action was on it. Without that covenant, and evidence that Carney had an interest in the land under the deed from O'Neil when the payment was made, there must have been a total lack of proof that the payment was other than voluntary, and a lack of proof that it was made to O'Neil's use. The declaration, then, should have been so far special as to exhibit the claim as founded on the covenant.

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The case appears to have been within the general rule which allows a recovery on the general count, where a special contract exists, *only* when the case is such that, supposing there had been no special contract, the plaintiff might still have made out a ground of recovery. Such appears to be the established rule of law, and we are not at liberty to depart from it upon any view of our own of its substantial propriety.

The judgment of the circuit court must be affirmed, with costs.

The other Justices concurred.

David McKee v. John P. Campbell.

Sureties: Bail bond: Contribution. A surety on a bail bond is entitled to contribution from a co-surety for any payment in excess of his share, unless there is an agreement to the contrary, express or implied.

Sureties: Money paid to the use of a co-surety: Contribution. Where a surety paid his own half, and joined with his co-surety in a note for the other half, and was sued and suffered judgment on the note, and paid the judgment, such note is to be regarded as given for the sole debt of the co-surety, and the money as paid to his use; in such case the necessary costs are recoverable back, as well as the debt, as they were caused by the default of the latter, and paid under legal compulsion.

Request to become co-surety. The fact that one becomes co-surety at the request of another surety, raises no obligation against the person so requesting, to save the other harmless; there is a legal liability to contribute equally, unless changed by agreement.

Payment under legal process: Waiver. Payment under legal process cannot be held voluntary; and therefore is no waiver of a right to pursue the party who should have liquidated the debt and saved the necessity of such payment.

Heard July 16. Decided July 22.

Error to Kalamazoo Circuit.

O. T. Tuthill and *H. F. Severens,* for plaintiff in error.

Edwards & Sherwood, for defendant in error.

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McKee v. Campbell.

Campbell, J.

The suit below was brought to recover back a sum of money paid by Campbell upon a liability alleged to have arisen from certain transactions in which they were co-sureties. Having become joint bail for one Ginley, their bond became forfeited, and process was issued out of the United States district court to collect it. Campbell paid his half, and became jointly bound upon negotiable paper with McKee to raise money to pay the remainder, which he claims was McKee's share. This paper not being paid, they were sued upon it, and Campbell suffered judgment by default, which he paid. This suit is brought to recover back this money, and in the circuit court a recovery was had, which is now brought up for review on error.

Objection was made to proving this judgment, which was proven in connection with the note on which it was rendered. The objection urged was chiefly that no recovery could be had by a co-surety for costs.

The note in question was given for a debt which was all due from McKee, if he was bound to pay any of it. It represented no more than his half of the old joint debt, of which Campbell had paid his full share. This note, then, was, on plaintiff's theory, the individual debt of McKee, who as between himself and Campbell was principal debtor upon it, while Campbell was sole surety. All the money paid upon this demand was paid to McKee's use. He, then, as principal debtor, could not expect or require his surety to pay it, but was bound to pay it himself and prevent suit. Not doing so, it was his fault that the surety was subjected to suit, and he is bound to indemify him for all of his necessary outlays. The costs on default were the least to which a defendant can be subjected, and it would be a strange doctrine if a surety should be held lacking in duty to his principal for not paying his debts. Whatever may be the doctrine where the suit is merely for contribution (upon which no opinion is called for in this case) there

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can be no doubt of the right to recover any unavoidable costs against a principal whose sole debt a surety has paid under legal compulsion.

The other questions most important to be considered, arise out of a claim set up by McKee that in fact he was induced to become bail for Ginley upon the obligation of Campbell to save him harmless, whereby the latter was bound, as between them to pay the whole. There was some conflict of evidence concerning what took place when the original arrangement was made. The court was asked to charge that if McKee became co-surety on the bail-bond at Campbell's request, he was not liable to contribution, and Campbell was bound to exonerate him. The court refused so to charge, but held the liability to contribute would exist unless there was some agreement or understanding to the contrary. We think the ruling was correct. The request made was put in the language of some *dicta* that have been repeated in a few text-books and decisions. But when the direct question has been raised, it has generally, at least, been presented on a distinct understanding. The law implies from all joint obligations a *prima facie* liability to contribution, which may be overcome by showing that one is bound to protect the other. This may be, either because he is a principal debtor on his own account, or because he has undertaken to save the other harmless. But the mere request to another to join him as a co-surety, would upon all ordinary rules of construction mean that he was to enter upon the same responsibilities, and become bound on equal terms. Such we conceive to be the doctrine of the authorities, in spite of some careless expressions which do not, we think, fairly interpret the doctrine applied. We find in several cases, not only discussion, but conflicting decisions, upon the question whether a positive agreement for such a modified liability could be created by parol,—which would have been an idle inquiry if a mere signing by request would operate as a claim to indemnification. The authorities which contain actual decisions upon the

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point before us indicate that the change of responsibility must be founded on a plain understanding to that effect.—See *Batard v. Hawes, 2 El. & Bl., 287; Apgar v. Hiler, 4 Zab., 812; Barry v. Ransom, 12 N. Y., 462; Norton v. Coons, 2 Seld., 33; Chapin v. Merrill, 4 Wend., 657; Daniel v. Ballard, 2 Dana, 296; Thomas v. Cook, 8 B. & C., 728; Keith v. Goodwin, 31 Vt., 268.*

It is also charged as error that the court told the jury that if McKee voluntarily paid to the marshal the money raised on the note to secure his own liability on the recognizance, he waived any indemnity from Campbell.

This was error. There was no evidence tending to prove a voluntary payment. Whatever was paid to the marshal upon his writ, was paid under legal compulsion. A party is not bound to wait until a levy is made, but may always assume that an officer will enforce his process, when he makes a demand under it. No payment made upon such a pressure can be regarded as any thing but compulsory.—*First Nat. Bk. v. Watkins, 21 Mich. R., 483; Atwell v. Zeluff, 26 Mich. R., 118.*

For this error there must be a reversal. The other questions arising under the bill of exceptions are not likely to come up again in the cause, and it will not be necessary to discuss them further than to say that we have found no errors except the one pointed out.

Judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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Andrew J. Templeton v. The People.

Criminal law: Examination: Defense: Evidence. The fact that a prisoner on trial for a criminal offense gave no evidence on his examination before the magistrate, cannot be shown on his trial as evidence of his guilt, or as ground of an inference or presumption against his innocence; otherwise all benefit of the privilege which the statute expressly gives the prisoner of electing to make or not to make defense on his examination, would in effect be taken away from him.

Information. The objection to a count in an information charging an attempt to murder by poison, that it does not set forth the special circumstances of the attempt, is untenable.

Evidence. Upon the trial for an attempt to murder by poison, evidence of a prior criminal intimacy between the prisoner and the wife of the subject of the alleged attempt, and that she was sought to be used by the prisoner as an instrument in the attempt, is competent as showing the relations between them, and as bearing upon the means and opportunity to commit the offense, as well as the motive.—*People v. Jenness*, 5 *Mich.*, 333, cited and approved.

Heard July 16. Decided July 22.

Error to Saginaw Circuit.

William A. Clark, C. S. Draper and *William H. Sweet*, for plaintiff in error.

Dan P. Foote and *Byron D. Ball, Attorney General*, for the People.

GRAVES, J.

The plaintiff in error was charged with an attempt to murder by poison, and was convicted and sentenced.

On the trial the prosecution was allowed, under objection, to give in evidence the return of the examining magistrate, to show that upon the examination he gave no evidence, and the court instructed the jury that they were at liberty to consider this as entitled to more or less weight, as it should seem to them proper and just, as evidence bearing on the prisoner's guilt.

We think in this the court erred. While we do not doubt but that the fact that a person charged with crime

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makes no defense on the preliminary examination, may be necessary and proper evidence frequently to support or establish some point or proposition, we are clearly of opinion that it cannot be introduced, as in this instance, on the trial of the charge on which he was examined, to prove his guilt. The statute expressly gives the prisoner an election to make or not make defense on his examination before the magistrate, and any rule which would make the exercise of such right, one way or the other, a ground of presumption against his innocence on the trial, would be nearly, if not quite, tantamount to a denial of the right altogether. The law wisely leaves him to his free choice to put in evidence or not, before the magistrate, and this privilege can not be hampered by making its exercise one way a ground of inference on the trial, of his criminality. The right to refrain from defensive action before the magistrate is as clearly given as the right to take the contrary course, and it would be reflecting upon the consistency and justice of the law to say that while it secures this as an absolute right of the prisoner in the proceedings, it at the same time turns it into evidence against him.

An objection was taken to the sufficiency of the first count in the information on the ground, as we understand, that it did not set forth the special circumstances of the attempt. This objection, however, was not much pressed, and it is not maintainable.

Under objection, evidence was given having a tendency to show that a criminal intimacy had for some time prior to the attempt existed between the prisoner and Mrs. Neriter, the wife of the subject of the alleged attempt, and that she was sought to be used by the prisoner as an instrument in the attempt. It is claimed that this evidence was improper, as tending to show a distinct criminal offense, in order to raise an inference that the prisoner had committed another and wholly different one.

We think the evidence was clearly admissible, to show the relations between the prisoner and Mrs. Neriter, under

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the circumstances of this case. The evidence was pertinent as bearing upon the means and opportunity to commit the offense, and as bearing also upon the question of motive. The doctrine was fully discussed in *People v. Jenness, 5 Mich., 323;* and it was also elaborately examined in *People v. Stout, 4 Park., C. C., 125.*

Some minor objections appear in the record, but as the questions will not be likely to arise on another trial, it is useless to discuss them.

The judgment must be reversed, and a new trial ordered. An order must likewise be entered requiring the prisoner to be remanded to the custody of the sheriff of Saginaw county, to be held pursuant to law for further proceedings.

The other Justices concurred.

The East Saginaw City Railway Co. v. August Bohn.

Street railways: Vehicles: Passengers: Unsafe places. It is the duty of a street railway company to provide vehicles which insure security to their passengers, and not to suffer them to occupy unsafe places upon such vehicles.

Contributory negligence: Children: Discretion. If this duty is neglected, and a passenger is injured, he cannot recover damages of the company if his own neglect of the duty of self-preservation contributed to the injury; but duty can only be predicated of one who has capacity to understand and ability to perform it; and therefore a child not of an age or discretion to understand the danger in riding upon the front platform of a street car, cannot be charged with negligence in so doing.

Street railways: Children: Parents: Contributory negligence. Parents have a right to assume that street railway companies furnish conveyances which are reasonably safe, and have regulations which preclude persons from riding in unsafe places upon them; and they cannot, therefore, be charged with negligence in permitting their children to ride on the street cars without escort, if the company consent so to receive them.

Riding upon front platform: Negligence: Children. While the company would not be liable to a person of suitable age and discretion who, being warned of the danger in riding upon the front platform of the car, should persist in doing so, yet, in case of a child, lacking such discretion, and to whom, consequently, negligence could not be imputed, it would be the duty of the officers of the company not to stop with a warning, but to compel such child to occupy the proper place in the car.

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EAST SAGINAW CITY RAILWAY COMPANY *v.* BOHN.

Street railways: Children: Negligence: Liability. Where a child four years of age, in company with his brother, twelve and a half years old, took a street car, and both sat down on the front platform with their feet on the step, and there was no other interference with their riding there except that the conductor claims (which, however, is denied) that when he took their fare he told them to go into the car, and the younger boy, in some way unexplained, got off the car while in motion, and was run over, negligence cannot be imputed either to the parents of the children, in permitting them to take the cars alone; or to the younger boy; or to the older boy, without a showing that he had more than the ordinary discretion and judgment of boys of his years, and that he understood the danger and the difficulty of protecting both himself and his brother against it; but the company was guilty of negligence in permitting the boys thus to ride, and liable in damages for the injury.

Heard July 17. Decided July 23.

Error to Saginaw Circuit.

Sutherland & Wheeler, for plaintiff in error.

Frederic L. Eaton and *Albert Trask*, for defendant in error.

COOLEY, J.

The suit in the court below was brought against the railway company on behalf of August Bohn, an infant, to recover damages for an injury done to him by one of the cars of the company, and, as was claimed, through the negligence of its servants. The declaration avers that on the fourth day of August, 1869, the railway company was a carrier of passengers by cars drawn by horses over its track, laid down in certain streets in the city of East Saginaw, and to a certain point in South Saginaw, which cars, as well as the persons who should become passengers upon said railway, were under the power, control and management of certain servants of said company; that the plaintiff, being then an infant of the age of four years, became a passenger on one of said cars, with the permission and consent of defendant; that he entered upon the front end of said car, and finding the door thereof closed and the way thereto barred and obstructed by trunks, boxes of merchandise and other freight, he (the said plaintiff), with the

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consent and permission of said defendant, was seated upon the platform of said car with other passengers then and there being carried by said defendant, and under the care, charge and direction of said defendant, and in that position started upon his journey from a point where Genesee street crosses said track to another point opposite Darmstetter's brewery; that while so seated, the driver of said car, being then and there a servant of said defendant, and having the care and control of such passengers, occupied a part of such platform, and the conductor of said car, being then and there also a servant of said defendant, and having the care, control and management of said car and all persons thereon or about said car, opened said door from the inside thereof, and collected the fare of the passengers upon said platform, and then returned to the inside of said car and closed the door thereof. And plaintiff avers that the said defendant then and there carelessly, negligently and wantonly consented, permitted and required the said plaintiff, while so being transported as aforesaid, to pursue his said journey upon the said platform in a careless, unsafe, dangerous and exposed situation; that before the car reached the end of plaintiff's said journey, he (the plaintiff), while using all due care, diligence and caution, was thrown violently to the ground, by the motion of said car, in such a manner that the wheels of said car passed over his left leg, and broke and injured it in such a manner that amputation thereof became necessary to save the life of said plaintiff.

On the trial it was not disputed that an injury occurred to the plaintiff in the manner and of the nature alleged, and the questions raised were, whether the servants of the defendant were guilty of negligence contributing to the injury, and if so, then whether the plaintiff or those in whose charge he was, in fact or in law, were not also guilty of contributory negligence of a nature and degree which would preclude recovery. To understand the legal questions, it may be advisable to present the several accounts

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of the transaction given by the plaintiff's brother, who was with him at the time,—the plaintiff himself being too young to be sworn—and the conductor of the car and one passenger. The driver was not sworn.

The brother, Henry Bohn, testified that at the time of the injury he was about twelve years and six months old, and the plaintiff four years and five months; that about eleven o'clock in the forenoon his mother sent him with a jug to a store after a gallon of vinegar; the distance appears to have been about a mile; the plaintiff wanted to go along, and was at first refused permission, but the mother afterwards consented, and told the witness that they should walk down, but might take a street car back, and gave him money to pay the fare; they went accordingly and got the vinegar, and returning took a street car, which, however, was found to be going only a part of the distance, and they were obliged to get out and wait for another. When the second car came along, they got upon the front platform; there was a lot of boxes there piled up, with trunks on top of them half way to the top of the door; the driver was on the platform, and a Mr. Randall; the boys sat down on the platform with their feet on the steps, and the witness held the jug between his legs; after the car started the conductor came out to take the fare; he put his hand on the shoulder of the witness, who looked up, and seeing what was wanted, paid him six cents; then the conductor told the driver to let the boys off at the brewery, and then went back into the car and shut the door; he said nothing more, and quitted the car right afterwards; before they got to the brewery plaintiff stood up to see if they were near home, and just as he went to sit down the jarring of the car tore away the hand of witness from plaintiff; witness was not looking at plaintiff at the time, and when he looked around he was gone; the driver asked him if his brother fell off, and witness replied, yes; the driver hit his horses and went right on; witness asked him to stop, but he did not, and witness then picked

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up the jug and jumped off, and found his brother had been run over and one leg crushed.

The evidence of the conductor differs from that of this witness in several important particulars. He denies that the front platform of the car was occupied by boxes or trunks, though he says there was a basket standing there, and he also says that when he went out on the platform and took the fare from the older boy, he told them to come into the car. Randall, the passenger who was on the platform with the boys, corroborates the conductor as to the absence of boxes or trunks. He also claims to have been looking at the little boy at the time of the occurrence, and testifies that he jumped off, and that when the older boy asked the driver to stop and let him off, he checked the speed of his horses, though he did not stop.

This is perhaps a sufficient statement of the evidence given to answer the purpose of presenting the legal points. The defense insisted that the allegation in the declaration that the plaintiff, when he entered upon the platform, found the door closed and obstructed by boxes, etc., and seated himself on the platform with permission of the company, etc., was material, and must be proved. The defense also claimed, and requested the judge to charge the jury, that if the plaintiff on the occasion in question rode upon the car with the knowledge and permission of his mother, she knowing that he was attended by no other person than his brother, a youth of the age of twelve or thirteen, and that plaintiff fell off or jumped from the cars voluntarily, or from a want of discretion, and because he was not properly guarded by his attendant, he was not entitled to recover. Also, that if the plaintiff, before the accident, was seated on the platform of the car with his feet on the step and some means of holding himself in his seat by his hands, and that he was in company with an older brother capable of exercising a reasonable discretion for the plaintiff's safety, and that he was safe while thus sitting, from being thrown off the car by its motion, the defendant's servants in charge

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of the car were not required to exercise care or oversight to prevent the plaintiff from voluntarily changing his position, and thereby exposing himself to be jostled off the car, or from attempting, with childish indiscretion, to get off the car while in motion. Also, that if from the plaintiff's evidence it is doubtful whether the plaintiff jumped off or fell off from the car, the plaintiff could not recover. Also, that if there were seats inside the car, and plaintiff was seated on the platform by his brother, with the intention to ride there to their destination, and was told by the conductor to come in, and did not, and the accident would not have occurred if they had been in the car, the plaintiff could not recover. These requests and others of like nature were refused.

The requests in effect assume that if the older of the two boys was wanting in discretion for the protection of himself and his brother, it was negligence in the mother to permit the plaintiff to go upon the cars without other attendance; and if the brother had such discretion, then it was negligence in him to seat himself and the plaintiff on the platform as he did; and in either case the defendant would be excused from legal responsibility for the negligence imputed to them, because the injury resulted from the concurrent negligence of the mother or brother, who, for the time, must be regarded as occupying the position of guardian for the plaintiff, and whose negligence, therefore, was in law imputable to the plaintiff himself.

If the railway company at the time had been under no obligation of care or responsibility for the plaintiff as a passenger upon their cars, the question of liability would be very different from the one now presented. But this company hold themselves out as carriers of passengers for all who may come, and provide vehicles which promise reasonable protection and security to those who commit themselves to their care and custody for the purpose of carriage. They do not reject a child because he is young and wanting in discretion, or a person weak or demented, or one physically

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incapable of self-protection against the accidents which might result from careless management. This mode of transit, on the other hand, is supposed to be specially adapted to the needs of those classes of community whose physical strength and capacity is least, or whose limited means put the more expensive modes of conveyance beyond their reach. It is unquestionably a great convenience to men of business, in the ready facilities it affords for passing from place to place in response to business calls, but it is not less so to the poor laborer employed at a distance from his home, or to the pupil residing a long way from his place of instruction, or to the child whose parents' necessities compel his being sent upon errands, or to the families of laboring men, who by means thereof are enabled to enjoy occasional holidays in the public parks, or in forest or open fields, which otherwise would only be accessible to them at an expense beyond their means. All these classes quite as much, at least, as those whose circumstances make them more independent, are invited by the railway company to take passage upon their cars; and it cannot be held that a parent is guilty of negligence in permitting a child who lacks the judgment and discretion of an adult person, to accept the invitation, unless the car would be to the child a dangerous conveyance notwithstanding any oversight the company may reasonably be expected to provide. If it is thus dangerous, the question may be a serious one, whether it may not become the duty of the legislature, out of regard to human life, to prohibit by law the reception upon the cars of such children unless attended by parents or guardians. Such a prohibition would go far towards striking a fatal blow at the profits of these companies, inasmuch as the use of their cars by the poorer classes of community would to a great extent be precluded, if escort for children must always be provided.

The privileges of these railway companies are conferred by the state, and it is assumed in granting them that the mode of conveyance they provide is not only convenient,

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but is reasonably safe. The state would never grant the corporate privileges on any other supposition, nor would it permit the use of the public streets by persons holding themselves out as common carriers of passengers, whose means of transportation made their invitation to a passenger to take conveyance with them an invitation to danger, and possible mutilation and death. A railway company, for instance, who should propose to carry passengers upon an open platform without seats, would not only, in consideration of the danger attending that mode of conveyance, be denied special privileges in the streets for their vehicles, but it would become the duty of the authorities, from a proper regard to the lives and limbs of its citizens, to prohibit such a constant and dangerous temptation as such vehicles might prove to thoughtless or foolhardy persons. It is not the policy of the law to permit even the most mature and capable persons to run recklessly or unnecessarily into danger; but from the highest considerations of the public good, it seeks to protect every individual citizen, not only against assaults and wrongs at the hands of others, but also against the risks that might spring from his own folly or rashness. The law does not content itself with denying him a remedy against other persons, where, through their concurring negligence, he has suffered an injury, but it seeks to lessen the probabilities of negligent injuries by precautions which those likely to suffer them are required to observe. Our general incorporation acts, and especially those relating to railways, contain many such regulations.

If public policy would forbid the use of open and unseated vehicles for the transportation of passengers, then we are warranted in saying that the railway company, when they suffer their passengers to ride upon the platforms of their cars, which are in like manner, though perhaps not to the same extent, dangerous, are guilty of violating a wholesome rule of public policy, and of a disregard of their duty to the community from which they receive their privileges. They may nevertheless permit this in a great many

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cases without incurring pecuniary responsibility, because the persons suffered thus to ride are equally with themselves guilty of a violation of duty, and where the concurrent neglect of the two results in an injury, the law will not suffer the injured party to recover from the other, because to do so would give him compensation for his own default, and remove an important security against the like defaults in the future.

But duty can only be predicated of one who has capacity to understand and ability to perform it. If the owner of a vehicle which it was dangerous to ride upon should invite a person as capable of understanding the danger as himself, to take passage with him, the latter, if he should accept the invitation, and be injured, would have no remedy, because of his neglect of the duty of self-protection. But if children under the age of discretion to understand the danger should be invited into it in like manner, the carrier could plead no exemption, because upon the child no such duty could rest in such a case, and the law would not be embarrassed with difficulty in fixing the responsibility where alone it should rest. If the proper guardian of the child should be present and consent, the carrier might, perhaps, be relieved of his responsibility, but this would not be because he was justified by the consent, but because, with fault on both sides, the law will not undertake the task of justly apportioning the consequences according to the culpability.

A railway car, however, is not supposed to be a dangerous vehicle of conveyance to those who take it. It is a covered conveyance, provided with doors and seats, and passengers are expected to occupy the seats. A mother who consents to her infant children going upon the cars, is supposed to know that it is a reasonably safe conveyance. She may also be supposed to know that the proprietors have regulations which preclude persons riding in unsafe positions upon it, and that the persons in charge have authority to enforce these regulations. She will, therefore, with

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reason, expect that her children, if they lack judgment to decide for themselves what the dangerous positions are, will be warned and kept out of them by the authority of those in charge. Under such circumstances the mother may, with the utmost confidence, intrust her children to the street car, on the supposition that instead of sending them into unusual dangers, she has actually placed them where they will be safer than upon the public streets on foot. She can consequently be guilty of no negligence in permitting them to take the cars by themselves, if they have reached an age which would justify their being suffered in the public streets, and if the railway company have no regulations which will preclude their being received thus unattended. If they are unsuitable persons to receive and carry without a guardian, the company might doubtless refuse to receive them; but consenting to receive them as passengers, it would become their duty to give all reasonable care and make reasonable provision for their safety.

That the duty of the railway company not to permit persons to ride in unsafe places on their cars is the same, and rests upon the same reasons, with their duty not to make use of vehicles wholly unsafe, appears to me entirely clear. There are, without doubt, some limitations upon that duty, growing out of the manner in which their business is usually and properly conducted, but it does not become necessary to consider those limitations at any length, in the present case. Such carriers could not in reason be required to be insurers of their passengers against all dangers, nor, perhaps, to employ a person to keep watch upon their passengers, to protect them against dangers resulting from their own folly or neglect. Perhaps it is admissible that the driver should be also conductor, in which case he could not be expected to watch against persons falling off the rear platform or crawling out of the window. If, however, it was dangerous for passengers to stand or sit on the front platform, where the driver himself would be, it would not only be his right and duty to notify any who-

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might occupy it of the danger, but if they were of an age not to be likely to understand the risk, or able to judge for themselves, or if he knew them to be insane or otherwise unable to exercise discretion, the duty would not be fully performed without an enforcement of proper regulations to compel their occupying positions less exposed.

The conductor in this case claims to have performed his duty when he directed the boys to go into the car. Henry Bohn denies that he was so told; but we may safely believe the conductor, without charging the boy with intentional misstatement, as the noise of the car is always considerable, and the conductor does not seem to have taken any pains to see that his direction was obeyed, or even understood. It is quite possible it was not heard at all. Assuming that it was, the question remains whether by giving it the conductor performed his full duty. I think he did not, unless the older boy was of an age and discretion to justify his being allowed to act and judge both for himself and for his brother, and to take upon himself all consequences. If he had not reached such an age and discretion, the conductor's duty did not stop with the warning, but the warning should have been an order, and either he or the driver should have compelled obedience.

In judging of the measure of responsibility to which the older boy should be held, something more must be considered than merely his age. Some dangers the youngest persons shrink from instinctively, while an appreciation of others only comes from extended observation and experience. A child of four will shudder at the proximity of a precipice, when one of thirteen, to whose knowledge an injury from careless riding upon a street car has never come, will not anticipate danger from any thing apparently so safe. It is within the observation of all travellers and all persons having the management of railway trains, that boys of from eight to fourteen years of age are much more ready to place themselves in exposed positions upon cars, and to jump off and on recklessly, than are persons of mature

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years. It is not necessarily to be assumed that they purpose subjecting themselves to danger, but they lack the experience and observation which teach the danger, and without which a man in the full maturity of his intellect might be guilty of a recklessness equal to theirs. At that period of life, too, the childish impulses and propensities are as strong and active as ever, and if notified of a danger, they cannot be expected to keep a consciousness of it present to the mind, or to observe that watchful ward against it which would be looked for in an older person. It would be unreasonable and cruel in the extreme to hold such a child responsible for a prudence and foresight beyond his years, and for a perception and comprehension of dangers which are only learned by experience, or by observation and reflection.

Assuming, however, that a child has reached an age to be properly entrusted with the direction of his own actions, it does not follow that he is fit to take upon himself authority over the actions of others. A child of twelve might ride with entire safety in a position where, though exposed to danger, his strength and agility would be sufficient for his protection, but where it would be quite out of his power to render much assistance in the protection of a helpless person. If, under such circumstances, he should expose himself only and suffer an injury, it might fairly be charged to his own folly; but if he should expose a younger child entrusted to his care, any other person in a position of authority over him would justly be held highly blamable if he did not interfere. To protect another, agility and strength may not be sufficient, but he must have judgment, foresight, and constant watchfulness, so as to anticipate possible dangers, and be prepared with his assistance, however unexpectedly the perils may come. He must have his boyish propensities under control, so as not to let his curiosity, or any thing else, throw him for a moment off his guard. The degree of watchfulness and prudence required would, of course, be proportioned to the

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nature and degree of the danger, but it may be laid down as an axiom that whatever is beyond the ordinary judgment and discretion of such a child cannot reasonably be required of him, and consequently his failure to perform it cannot be treated as neglect of duty. The measure of reasonable discretion must be the measure of duty in such a case.

Whether the older boy in this case had reached an age at which it could be said he ought to have understood the danger, and to have kept his brother from it, was the question really at issue. His watchfulness was found, in fact, to be equal to his own protection, but though he kept his brother by his side and his hand upon him, it was not equal to the protection of both. It may safely be assumed of such a boy that he would not appreciate the difficulty of protecting another where he could protect himself, as a person more mature and of more experience would be likely to do, and this fact the conductor and the driver were bound to understand and to act upon. They were bound to know that they were carrying the plaintiff in an exposed place without suitable protection, and their neglect of duty was very obvious and gross in permitting it. We cannot say that the brother was guilty of a like default.

There are, doubtless, some children, even of this tender age, who show a prudence and thoughtfulness, and an ability to guard against dangers, commonly belonging to riper years; and it may therefore be urged that the judge erred in not submitting more distinctly to the jury the question of the actual discretion and judgment of this boy. Such cases, however, are purely exceptional. They are commonly cases of premature maturity, brought about by want, or by the absence of suitable protection, and the consequent necessity for self-protection against rough treatment at the hands of others. It was not claimed that this case was exceptional, and we discover no evidence in the record to show it, unless proof that the boy had been in the habit of riding on the cars could be said to have that tendency.

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That experience, unless he had known of accidents from riding in exposed places on the car, would be quite as likely to lead him into a false security as to disclose to him the dangers, and consequently, standing alone, nothing could be predicated upon it. The judge and the jury, I think, had the right to assume that this boy had the ordinary discretion and judgment of boys of his years, and no right to require of him any more. The judge charged the jury that the railway company were required to act towards the plaintiff in the situation in which he was; that is, considering his age and capacity, and the fact that he was there with a brother of the age named. They were not required to use toward him the same care and skill that might have been required had he been alone. They received him as he was, attended by his older brother, and were required to act towards him with that fact in view. The jury, he said, could readily see that possibly less care might be required than if he were there alone. They received him and carried him over their road, in connection with the dangers of passage on that car with the older brother, and they were bound to act towards him just as he was situated. And he further instructed them that if the brother was of an age to have exercised reasonable discretion, and plaintiff was seated where, with the exercise of such discretion in his behalf, he could ride in safety, plaintiff was not entitled to recover, unless the injury resulted wholly from the negligence of the company. This charge appears to me all the defendant had a right to demand.

If it was negligence in the company to suffer the plaintiff to ride on the platform, it is immaterial whether or not he was compelled to ride there by the difficulty of getting into the car. The action is for negligence in carrying him in an exposed and dangerous place on the car, and the negligence was the same whether he was compelled, or only permitted to ride there. The culpability might have been greater in the former case, and it might have been proper

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to give heavier damages; but the case is made out when the negligence is established.

The suggestion that the plaintiff is not entitled to recover, if it is doubtful how he got off the cars, has no force. Randall, who was father-in-law to the conductor, testified that he jumped off, but his testimony throughout is exceedingly unsatisfactory, and I think the jury would have been well warranted in concluding that the plaintiff, in rising up from some childish impulse or reason, was thrown off by the motion of the car. This subject was fairly left to the jury on the evidence, and defendant could ask no more.

I find no error in the record, and am of opinion that the judgment should be affirmed, with costs.

The other Justices concurred.

Chauncey Joslin v. Matthew Millspaugh.

Abatement: Pendency of foreclosure suit. The pendency of a foreclosure suit in equity is not pleadable in abatement to a suit at law on the debt.

Mortgages: Statute construed: Double remedies: Discretion. The statute (*Comp. L.*, § 5149) which prohibits legal proceedings pending such a foreclosure, without leave of the court, leaves the question of permitting such proceedings to be determined in equity by the court where the foreclosure is pending, and not at law. That court will compel an election of remedies, or permit the double action, in its sound discretion.

Foreclosure: Election of remedies: Discretion. The effect of this statute is to put foreclosure suits on the same footing with other suits in equity where an election of remedies is enforced subject to discretion. The courts of equity having now power to grant a personal decree for the debt, a resort to law is needless for that purpose, and there is no reason for making the exception which formerly existed in foreclosure suits in favor of exemption from election between law and equity.

Submitted on briefs July 17. Decided July 22.

Error to Wayne Circuit.

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JOSLIN v. MILLSPAUGH.

C. Joslin, in person, for plaintiff in error.

Ninde & Crane, for defendant in error.

CAMPBELL, J.

To a suit on a promissory note, defendant pleaded in abatement the pendency of a foreclosure suit upon a mortgage given to secure the note, and this plea was sustained. Error is brought upon that holding.

The statute regulating proceedings in chancery provides that after a bill of foreclosure is filed, while it is pending, and after decree, "no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court."—*Comp. L.*, § *5149*.

The prohibition being subject to the dispensation of the court of chancery, and not to that of the court in which the action at law is begun, which may be in a different jurisdiction, the question at once arises whether the pendency of the foreclosure calls for interference in equity, or is to be shown at law. To determine this we must look at the analogies in like cases.

It has always been the practice in equity, in all but mortgage foreclosures (unless there may be some other special exception not usually noticed), to require a party who sues at law on the same cause of action, to elect, after answer, whether he will prosecute at law or in chancery. The court has also used some discretion on the subject, and has, in proper cases, allowed a double procedure under conditions. The reason why mortgage foreclosures were not governed by this practice was that the foreclosure did not include either a possessory remedy or a personal judgment for the debt, which must therefore be sought by ejectment and personal action. And as both of those remedies might be essential to justice, and neither interfered with the other proceedings, they were all allowed to go on at once.

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But in cases where election was practically a matter of course, the pendency of another suit was not pleadable in abatement, either at law or in equity. There is no such thing known in a common-law court as a plea in abatement of a suit in equity. A party having a common-law right was allowed to proceed at common law if he chose, and could only be restrained by the court of equity acting by way of injunction or some other prohibitory measure. And in like manner the suit at law was not brought before the court of equity by pleading in abatement, but usually suggested on motion after answer, unless appearing by the pleadings. And, as already intimated, the court upon such motion required the election to be absolute or qualified, according to circumstances.

Our foreclosure proceedings provide for both possession and a personal judgment or decree. The change in practice had the effect to put mortgage cases on the same footing with other equitable causes, and to leave them subject to the same occasion for an election of remedies. The effect of this statute is to put all on the same footing. There is no more reason, therefore, for allowing a plea in abatement in foreclosure cases than in any others, and it would be anomalous to draw a distinction without some reason, unless the statute requires it.

It is not necessary to allow a plea at law in order to prevent injustice or inconvenience. As leave has to be obtained in chancery at any rate, before an action at law can be begun, it is more convenient to leave the whole matter to be regulated in the foreclosure suit by proper orders and restraints than to have it elsewhere. And we conceive the statute was not designed to introduce a new practice in the law courts, and allow a plea in abatement as to only one class of equity proceedings, when it does not authorize it in any others. The provision is found in the statute relating to foreclosures, and the natural inference is that it was merely designed to modify the old equity practice, and not to change the practice at law.

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We therefore hold (without considering the formal correctness of the plea, if admissible), that the remedy should be sought in the foreclosure suit, and not by plea in abatement.

The judgment must be reversed, with costs, and the cause remanded.

The other Justices concurred.

Emmons Saunders v. The Tioga Manufacturing Company.

Justice of the peace: Judgment: Docket entry. A justice's judgment which was rendered and entered by the justice upon his minutes is not void because it was not forthwith transcribed upon his docket.—*Hickey v. Hinsdale, 8 Mich.*, 267, cited and approved.

Taxing costs: Judicial action. A justice of the peace acts judicially in determining the amount of costs to be taxed in favor of the prevailing party in a suit tried before him.

Justice of the peace: Judgment: Damages: Costs: Relation. After judgment on a verdict for damages, a justice has authority to proceed, on the same day at least, to ascertain and determine the costs, and if necessary, with consent of the parties at least, may hold the case open a reasonable time for that purpose. The costs in such case, when ascertained, being an incident to the principal judgment, the determination of their amount relates back and takes effect as of the time of rendition of the judgment.

Justice of the peace: Jurisdiction: Presumption. While jurisdiction in the first instance, of a justice of the peace, must be shown and will not be presumed, yet, after jurisdiction of the cause and of the parties is once shown, and the question is whether it had afterwards been lost, it will be presumed, in support of his judgment, that he acted regularly, and that his proceedings were valid, unless the contrary appears.

Submitted on briefs July 17. Decided July 22.

Error to Mecosta Circuit.

Fuller & Parsons, for plaintiff in error.

Frank Dumon, for defendant in error.

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SAUNDERS v. TIOGA MANUFACTURING COMPANY.

CHRISTIANCY, CH. J.

This was a *certiorari* from the circuit court of Mecosta county, to a justice of the peace, in a suit in replevin, in which the manufacturing company was plaintiff and Saunders defendant. The circuit court affirmed the justice's judgment in favor of the company, and the case comes to this court upon writ of error.

The facts appearing upon the affidavit for the *certiorari* and the justice's return, so far as material to the questions raised, are these: The case was tried in the justice's court, before a jury, on the 17th of December, 1872, and the jury on that day rendered their verdict, assessing the plaintiff's damages at thirty-six dollars; whereupon (as the return states) "I forthwith rendered judgment as follows: therefore it is considered that the said plaintiff recover against the said defendant its damages aforesaid; and also ——— dollars for his costs by him about his suit, in this behalf expended." He further certifies and returns, in answer to the affidavit, that "I entered said verdict and the judgment thereupon upon my minutes, but did not forthwith transcribe the same upon my docket; and I further certify that the costs of said suit were not fully taxed and entered until the morning of the 21st of said December, when the counsel for the respective parties appeared in my office, and taxed the costs at the sum of thirty-two dollars and forty-four cents."

The first objection of the plaintiff in error is, that the whole judgment is void, as well for the damages as for the costs, because not forthwith entered upon his docket. But our own decision in *Hickey v. Hinsdale, 8 Mich., 267*, disposes of this objection, and shows that the judgment is valid as to the damages, being actually rendered at once upon the verdict and entered in the minutes of the justice, though not upon his docket.

The second objection is that the judgment is void as to the costs, because not rendered until four days after the ren-

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dition of the judgment for damages, and when, as it is insisted, the jurisdiction of the justice to act judicially in the cause had terminated. I can see no reason to doubt that the justice, in determining the amount of costs in such a case, acts judicially. *Section 5375, Compiled Laws*, provides that "to entitle the prevailing party to costs he shall make it appear to the satisfaction of the justice that such costs were paid or incurred in good faith, believing the same material and necessary for the trial of said cause." And though the statute has fixed the fees of witnesses, officers, etc., it is for the justice to determine judicially what services have been performed by such officers, and what witnesses have attended, etc. It is therefore clear that his action in this respect is judicial.—See *2 Denio, 26*, and *5 Denio, 72*. These were decisions rendered under a statute which presents the question of the nature of the justice's action precisely as under our own statute.

Could the justice act judicially in determining or giving judgment for those costs four days after the rendition of the judgment for damages? Though the statute seems to contemplate that judgment for costs should be practically contemporaneous with the principal judgment, so that the whole shall operate as one entire judgment, yet, as the justice may have to hear evidence upon, and consider the items of costs to be allowed, there can be no doubt that after he had rendered the judgment upon the verdict for damages, he might still proceed at any time on the same day, at least, to ascertain and determine the costs. And if necessary to enable the parties to produce the proper evidence on either side, in proof of any item of costs, and especially if the parties at the time should for this reason consent, the justice ought to be allowed to hold the court open for this purpose a reasonable length of time, even beyond the day, to effect this object. The costs, when ascertained, being an incident to the principal judgment, the determination of their amount would relate back and take effect as of the time when the principal judgment was

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rendered; though the justice could not do this after the day when the trial was had, and after the parties and their attorneys had left, unless prior to that time for some good cause shown, or by consent, the justice should, on the day of trial, determine to hold the court open for this purpose, and so inform the parties or their attorneys; in which case I think it might be held open such reasonable time as might be found necssary for the purpose, though it might require four days.

The record does not expressly show that the court was thus held open for the purpose of taxing the costs, nor does it show any cause for the four days delay in ascertaining the amount. And, though the agreement of counsel as to the amount of the costs, if before the justice on the day of the trial, or while the cause was thus held open for the purpose, would be evidence upon which the justice might act in judicially determining the amount, such an agreement made on a subsequent day, after the close of the trial and after the parties and their counsel had left, if the court had not been held open for the purpose as above explained, would give no authority to the justice to act upon it, and his jurisdiction to act judicially in the case would be at an end.

The record does not expressly state that either of the parties appeared in the cause prior to or at the trial, by attorney, nor does it mention the name of any; but in stating the trial it states that "after hearing the proofs and allegations of the parties and the *arguments of counsel*, the jury retired," etc.

Nothing is to be presumed for the purpose of giving to the justice jurisdiction in the first instance, but such jurisdiction must be shown. Here, however, his jurisdiction of the cause and of the parties is shown; and the question is, whether he lost jurisdiction to determine the amount of the costs at the time they were determined; and upon this question we are bound, in support of the judgment, to pre-

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sume that he acted regularly, and that his proceedings were valid, unless the record shows the contrary.

This record does not show that the case was not properly held open in the manner and for the purpose above explained, nor that the parties did not appear by attorney; on the contrary, it furnishes some ground for an inference that the court was thus held open, and that the parties were properly represented by counsel having authority to represent them. If the facts were not so, it was easy for the party bringing the *certiorari* to have obtained a further return showing the facts upon these specific points.

We must therefore hold the judgment of the justice regular and valid, as well for the costs as for damages.

On these grounds the judgment of the circuit court must be affirmed, with costs.

The other Justices concurred.

Charles W. Tomlin v. Walter G. Fisher.

Certiorari: Affidavit: Return. In *certiorari* to review the proceedings of a commissioner upon a *habeas corpus* to inquire into the cause of the imprisonment of one held on an execution from a justice's court in an action of replevin, the statement in the affidavit for the *certiorari*, of the contents of the justice's docket in the replevin suit, cannot be received as evidence of what such contents were, unless adopted by the return as true.

Replevin: Imprisonment of defendant. Imprisonment of a defendant in replevin, though expressly allowed by statute (*Comp. L.*, § 5393) on an execution issued upon the judgment of a justice of the peace, is not allowed on an execution in the same action in the circuit; and could therefore be avoided by an appeal.

Heard July 8. Decided July 25.

Certiorari to N. W. Nelson, circuit court commissioner for Manistee county.

No question of the commissioner's jurisdiction was made in the case.

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S. W. Fowler, for plaintiff in *certiorari*.

Ramsdell & Benedict, for defendant in *certiorari*.

CHRISTIANCY, CH. J.

This is a *certiorari* to a circuit court commissioner, to bring up the proceedings had before him on a *habeas corpus* issued by him to inquire into the causes of Fisher's imprisonment; Fisher having been imprisoned on an execution from a justice's court in an action of replevin brought against him by Tomlin.

The affidavit for the *certiorari* sets forth, among other things, what is stated to be a copy of the justice's docket in the replevin suit, tending to show that the justice had obtained jurisdiction both of the cause and of the person of the defendant in that suit. But it was stated on the argument, and we do not understand it to be denied, that no copy of the affidavit for the writ of *certiorari* was served upon the commissioner, and the commissioner's return does not allude to it.

The commissioner, among other things, states in his return that the justice who issued the execution in the replevin suit was sworn before him, and produced his docket and files in that suit, but he does not state the contents or purport of either, nor whether the alleged copy attached to the affidavit for the *certiorari* is a copy of the docket as produced. The return, however, does state that upon the evidence before the commissioner he found that the justice had no jurisdiction of the petitioner (defendant in the execution), and he discharged him from imprisonment.

As the statement of the contents of the docket in the affidavit cannot be taken as evidence here of what such contents were, unless adopted by the return as true, it is quite evident we have not before us, in the present shape of the record, any evidence to show that the commissioner erred in discharging the prisoner.

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We intimated this difficulty to the counsel for the plaintiff in *certiorari*, upon the argument, but he did not choose to move for a further return. He had, at a previous term, obtained one order for a further return as to other facts, but asked none as to the facts above stated. An amended return, in answer to that application, has been made. In view of these proceedings as well as the further fact that the imprisonment of a defendant on a justice's execution in an action of replevin, is somewhat anomalous, and though expressly allowed (*Comp. L., § 5393*), no imprisonment is allowed on an execution in the same action in the circuit court (*Fuller v. Bowker, 11 Mich., 204*), and the defendant in a justice's court might avoid the imprisonment by appealing the case to the circuit, we think, under all the circumstances, that the case is not one in which we should be justified in ordering a further return upon our own motion.

The order of the circuit court commissioner discharging the prisoner must therefore be affirmed, with costs.

COOLEY and GRAVES, JJ., concurred.

CAMPBELL, J., did not sit in this case.

Samuel D. Eldred v. Rose A. Ryerson and others.

Accounting: Use of premises, etc.: Rental value. In an accounting under a decree directing that the defendants be charged for the use of certain saw-mill premises, wrongfully detained by them from the complainant for several years, and kept employed in sawing lumber, "what the use of the property would have been worth to a prudent man, with proper use, after keeping it in reasonable repair," the bare rental value under bargains entered into before the possession was taken is not the proper basis.

Heard July 10. Decided July 25.

Appeal in Chancery from Muskegon Circuit.

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ELDRED *v.* RYERSON.

John T. Holmes, for complainant.

Hughes, O'Brien & Smiley, for defendants.

COOLEY, J.

We seldom have a case brought before us in a shape more unsatisfactory than this. It was a case of accounting, brought to a hearing upon a printed record of near four hundred pages, and so far as we can determine from the papers, upon some mere verbal report by a commissioner, of his computation. The questions related principally to the value of the use of certain saw-mill premises, which had been detained from the complainant by the defendants for several years, and kept employed in sawing lumber. By the decree, the defendants Ryerson and Johnson were to be charged "what the use of the property would have been worth to a prudent man, with proper use, after keeping it in reasonable repair," and to be credited with certain payments made for the benefit of complainant. The circuit court decreed a certain amount in favor of complainant, but we have no information as to the basis upon which the court acted, and the record discloses the widest differences of opinion regarding the proper compensation, as well as the method of computing it.

So far as we are able to judge from the comparison of the amount of the decree with the evidence, we infer that the circuit judge has awarded what he thought the premises would have rented for by bargains entered into before possession was taken. This, though generally a just criterion of the value of the use of real estate, is not necessarily what should be charged against one who has wrongfully withheld possession from the owner, under circumstances enabling him to derive a benefit from the use much beyond what they could have been rented for. The decree in this case contemplated such a state of things when it fixed the basis for computation at "what the use would have been

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worth to a prudent man," instead of the rental value, and there is abundant evidence in the record that the use to defendants was worth very much more than the circuit judge has charged them with.

There is also a very important circumstance in the case, which cannot wholly be overlooked, namely, that the mill was burned up in defendants' possession after the time when by the decree they should have delivered possession to complainant, and while they were holding in defiance of the final determination of the appellate court. A party rightfully in possession of another's land cannot usually be properly charged with the consequences of accidental fires, but where he is holding wrongfully, he cannot with much propriety insist that he shall account for the value of the premises on the lowest admissible basis, and at the same time leave the party who is wrongfully kept out to take upon himself all risks. There would be no great injustice in such cases in requiring the wrong-doer at least to keep good the premises he was thus enjoying. This, however, is alluded to only to show that there are circumstances in the case which are unusual, and which bear hardly against complainant, and consequently that there is no special equity appealing to us on behalf of the defendants, and which would require us to adopt a rule of compensation as against them which would be the lowest admissible rule in ordinary cases.

Under other circumstances, we might, perhaps, send this case back for further proceedings; but it has already been a long while in court, and brought great expense upon the parties; and as all have joined in bringing it to a hearing upon the present record, we have proceeded to give it the best consideration we have been able, and have sought to deduce a just conclusion upon the voluminous and diverse evidence. Our conclusion is that the decree in favor of complainant was considerably below what it should have been, and that complainant should have recovered of defend-

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ants the sum of seven thousand eight hundred dollars. The decree should be modified to this extent, and complainant should recover costs in both courts.

CHRISTIANCY, CH. J., and GRAVES, J., concurred.

CAMPBELL, J., did not sit in this case.

Lawrence Dalton and another v. Charles Laudahn.

Lease: Stipulation for security: Mortgage. A stipulation in a lease "that all goods, wares and merchandise, household furniture, fixtures or other property, which are or shall be placed in or on said premises by the lessee, shall be liable, and this lease shall hereby constitute a lien or mortgage on said property, to secure the rent due or to grow due on this lease," with authority to the lessor, on default of payment of rent, or upon breach of any of the covenants of the lease, to enter the premises and take the property and sell the same as in cases of chattel mortgages, etc., and retain the amount of any rent due or to grow due on the lease, together with the costs of sale, etc., is not a mortgage, and conveys no present interest in the property.

Security clause in lease: Rent: Default: Pay-day. Under such a clause the right to take the property on account of rent could be exercised only on default in the payment of rent; and therefore a taking on the day the rent fell due could not be justified, as the tenant had the whole day in which to make payment.

Trover: Damages. In an action of trover by the tenant for property embraced in such a clause and seized by the landlord on pay-day, the plaintiff's damages cannot be limited to the value of the detention for one day, upon a claim that by reason of his having failed to pay the rent the seizure would have been lawful the next day, and would have authorized the detention of the goods for not only the rent then due, but also that to grow due, which was more than the value of the property.

Trover: Damages. The owner of chattels tortiously taken is entitled in trover to full compensation in damages, and no mere act of the wrong-doer can discharge him from liability. A subsequent sale on legal process against the owner and in favor of the trespasser, cannot be shown to reduce damages; and an appropriation under a mere power conferred by the owner, like that contained in the lease in this case, could certainly have no greater force than such a sale.

Heard July 22. Decided July 25.

Error to Wayne Circuit.

This was an action of trover, brought by Laudahn

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against plaintiffs in error. The defendants claimed that they had seized the property by virtue of the following stipulation in a lease of real estate, executed by them to the plaintiff:

"And the said party of the second part doth hereby covenant and agree that all goods, wares and merchandise, household furniture, fixtures or other property, which are or shall be placed in or on said premises by him, shall be liable, and this lease shall hereby constitute a lien or mortgage on said property, to secure the rent due or to grow due on this lease. And does hereby authorize and empower the said party of the first part, in case any default is made in the payment of the rent above specified, or any of the covenants herein contained are broken, that the said party of the first part may enter upon said premises, or take any of said mortgaged property wherever the same may be found, and sell and dispose of the same in the same manner as in cases of chattel mortgage on default thereof, giving six days' notice of the time and place of such sale, for the best price he can obtain for the same, and retain sufficient money to pay any rent due hereon, or to grow due hereon, together with the costs of such sale; and said party of the second part hereby waives all benefit of any exemption law of this state in reference to the sale of said personal property for rent."

They gave evidence tending to show that the property in question had been placed on the leased premises, and that on December 20th, 1872, the day they seized the same, and which was pay-day under said lease, the plaintiff had clandestinely removed said property therefrom, with intent to cheat and defraud them of the rent due, and to deprive them of their security; and that he had abandoned said premises during the previous night; that they had kept the property until January 6, 1873, when, having given six days' notice thereof, they sold the same at public auction for three hundred and one dollars and fifty-five cents; that the rent due on December 20th, 1872, was one hundred

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and twenty-five dollars, which had never been paid, and that no rent had been paid since that date. The plaintiff gave evidence to show that the dwelling on said premises was destroyed by fire in May, 1872, and that he abandoned the premises and removed the property therefrom in consequence of that fact.

The circuit judge instructed the jury, in substance, among other things, that under the evidence the plaintiff was entitled to recover the value of the property at the time it was taken, less the one hundred and twenty-five dollars rent due. The verdict was for plaintiff, and the damages were assessed at four hundred and twenty-three dollars and forty cents. The defendants brought error.

Minock & Baker, for plaintiffs in error.

Otto Kirchner, for defendant in error.

GRAVES, J.

The stipulation in the lease was not a mortgage.—*Holmes v. Hall, 8 Mich., 66.*

It was an agreement which, as between Dalton and Laudahn, empowered the former to subject the property pursuant to its provisions. And by those provisions the right to take property on account of rent could be exercised only on default in the payment of rent. The 20th of December was pay-day, and Laudahn had the whole day in which to make payment. There could be no default as to rent, therefore, until that day should be past. But the property was taken on the 20th, and consequently before default made in the payment of rent. There was no right given by the stipulation to take property to meet any other claim than rent, and it therefore becomes unimportant to inquire whether the writing on the back of the lease formed a part of it or not. As the agreement did not warrant the taking on the 20th, the act was a trespass.

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The property was sold at public auction pursuant to the agreement, and brought three hundred and one dollars and fifty-five cents. Under the instructions of the court Laudahn was allowed to recover the full value of the property less one hundred and twenty-five dollars, which was the amount of rent due on the 20th of December.

The plaintiffs in error claim that if Laudahn was entitled to recover any thing, it could not exceed such damage as he suffered in consequence of being deprived of the property from the time it was taken, on the 20th, to the 21st, when he would have been authorized to seize it; and this claim is based on the claim giving the right to take and sell the property in case of default, and to retain out of the proceeds not only the rent due, but that to grow due, and on the fact that the rent due at the time, together with that to come due subsequently, would exceed the sum for which the property sold.

Dalton had no interest in the property by force of the agreement, nor any right to take it on the 20th. Laudahn was owner and had full legal right to dispose of the chattels at any time during that day, and make the money to pay the rent. Such being the position of the parties as to their legal rights, Dalton nevertheless took the property and disposed of it, and he claims that if he had not taken it when his taking was unauthorized and a trespass, he might have taken it when his taking would have been warranted. As, however, he did not take it by authority, but by wrong, and by so doing precluded Laudahn from exercising his legal right to turn the property and pay the rent due on the 20th, I am unable to discover any satisfactory ground for saying that the damages should have been regulated by the circumstance that if the property had not been taken on the 20th, and Laudahn had been in default respecting the rent, there might have been a taking on the 21st. After the events which happened, it was not admissible to assume as a reason for regulating the recovery, that

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Laudahn would have been in default about the rent on the 21st, if the property had not been wrongfully taken on the 20th.

The rule seems to be settled that when property is tortiously taken, the owner is not only entitled to an action, but to full compensation in damages, and that no mere act of the wrong-doer will suffice to discharge him. A subsequent sale on legal process against the owner, but in favor of the trespasser, it has been decided, cannot be shown to reduce the damages.—*Otis v. Jones, 21 Wend., 394.* It would be otherwise if the subsequent legal proceeding should appear to have been in favor of some one other than the trespasser.—*Higgins v. Whitney, 24 Wend., 379.* If, then, Dalton had, after his tortious seizure on the 20th, proceeded against the property by legal process, to a sale and application of the proceeds on some demand held by him against Laudahn, his subsequent proceeding under process would not have been admissible to reduce the damages in an action for the original tortious seizure, and it is difficult to see how his position can be any better when, as in this case, he proceeds under a mere power conferred by the other party.

As this view disposes of the objections, the judgment must be affirmed, with costs.

The other Justices concurred.

Edward Middleton and others v. The Flat River Booming Company and others.

Injunction bill: Mill-owners: Water-power: Demurrer: Parties. An injunction bill, brought by a number of owners of mills and factories along a stream, to enjoin various acts which are alleged to have rendered the water-power by which their machinery is operated, of little value to them, and which does not ask for an accounting, is not demurrable on the ground that the complainants have no common interest; nor on the ground that other parties are interested who should be joined.

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MIDDLETON v. FLAT RIVER BOOMING COMPANY.

Injunction bill: Demurrer: Remedy at law. A demurrer to such a bill because it does not show that complainants have no adequate remedy at law cannot be sustained, as it is apparent that only an injunction can be an adequate remedy.

Demurrer: Corporation: Authorized acts: Vested rights. Where the bill sets forth facts showing a direct and unquestionable injury, a demurrer to it cannot be sustained on the ground that the acts complained of were authorized by the act under which the defendant corporation was organized, since the incorporation act cannot be understood as intending to authorize the destruction of vested rights of property.

Mill-owners: Floatage: Navigation: Paramount rights. On a stream which is valuable for floatage, but not for navigation in the more enlarged sense, it cannot be said that the right of floatage is so far paramount to the use of the water for machinery as to authorize the sacrifice of the latter to the former interest.

Injunction bill: Allegation of damage: Detention of water. Such a bill which avers that the water is detained by dams above complainants' mills, so as virtually to amount to a drying up of the stream, and to destroy its value as a means of furnishing water-power while the water is thus detained, and that very much is thereby lost by percolation and evaporation, is not demurrable for want of sufficient allegation of damage.

The objection that the location and description of the dams complained of are not given in such a bill, is not well taken.

Heard July 22. Decided July 25.

Appeal in Chancery from Montcalm Circuit.

J. H. Tatem and *Lemuel Clute*, for complainants.

Ellsworth & Lewis, for defendants.

COOLEY, J.

This was a bill in equity by a number of owners of mills and factories on Flat river, to enjoin the defendants from various acts which it is alleged tend to render the water-power by which their machinery is operated of little value to them. The bill was demurred to on various grounds, and was dismissed in the court below.

One objection is that the parties complainant have no common interest. They are owners of several mills, and only have a common interest in the question involved. The case is within the decision in *Scofield v. Lansing, 17 Mich., 437.* No accounting is asked for by complainants, and so far as the bill discloses the facts, the question is single, and no embarrassment can be occasioned by this joinder of complainants.

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It is said, however, that it appears from the bill that other parties are interested in the question, who should be joined if it is proper for more than one to file it. But this does not follow. The bill may be filed either by one alone, or by any number who feel the grievance.

It is also urged that the bill does not show but that the complainants have an adequate remedy at law. The obvious answer is, that if the allegations of the bill are sustained, only an injunction can be an adequate remedy. The complainants cannot be required to lie by and see their mills rendered useless and wait the slow and uncertain process of a suit for damages for their redress.

Another position of defendants is, that being an incorporated company, and authorized by the act under which they were organized to do the act complained of, they are not liable to such suits by private parties. The case of *Sheboygan v. The S. & F. R. R. Co., 21 Wis., 675,* is referred to, but it is not in point. There the act sought to be enjoined might or might not prove injurious, and it was very properly held that the question of nuisance ought to be tried at law. Here, if the facts are as alleged, the injury is direct and unquestionable. The incorporation act cannot be understood as intending to authorize the companies formed, to destroy vested rights of property; it supposes on the other hand, that they will use their corporate powers with the same regard to the rights of others which is required of natural persons.

Defendants further urge that they are organized for the enjoyment and improvement of the right of navigation, and that this is the paramount right on a navigable river, to which the rights of mill-owners must be subordinate. Flat river is a stream valuable for floatage, but not for navigation in the more enlarged meaning of the term. On such a stream it cannot be said that the right of floatage is paramount to the use of the water for machinery. Each right should be enjoyed with due regard to the existence and protection of the other. Complainants aver that in the erection of dams

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they have made proper provision, by constructing shutes, for the passage of logs, and they have a right to demand a like consideration for their interests on the part of those who use the stream for rafting.

It is objected that the bill does not sufficiently allege damage. It avers that the water is detained by dams above their mills, which virtually amount to a drying up of the stream, and destroying its value as a means of furnishing water-power, while the water is thus detained, and that very much is lost by percolation and evaporation, while thus detained. The allegation of injury is sufficient.

The object of this detention of the water we suppose to be, that it may be let down occasionally in larger quantities, and thus afford better floatage than can be had in the natural condition of the stream. How far this may be done with due regard to the rights of persons on the stream below cannot be determined on demurrer, but must be the subject of evidence. Complainants make out a *prima facie* case, which calls for answer, and it is to be presumed the court will be able to make the proper decree, when all the facts are before it.

The objection that the location and description of the dams complained of are not given, has no force. It is a general injunction the complainants seek against any such obstructions, wherever situated. The bill alleges that the defendants are threatening other obstructions than those already erected, and the injunction asked for reaches those as well as such as the existing structures.

The decree should be reversed, with costs, and the cause remanded with directions to overrule the demurrer, with leave to defendants to plead.

The other Justices concurred.

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Gustave Pfeffer v. Henry Steiner.

Partnership property: Trespass: Declaration: Surviving partner. The representatives of a deceased partner, before the partnership business has been settled and the debts paid, and while they have not yet been let into joint possession by the surviving partner, have but an equitable interest in the partnership property, and are not tenants in common at law; and the right of action at law for any trespass upon, or injury to, the property during this interval is vested solely in the surviving partner; and a demurrer to a declaration by the surviving partner upon such a cause of action, for non-joinder of such representatives, is not well taken.

Heard July 22. Decided July 26.

Error to Wayne Circuit.

S. Larned and *James A. Randall*, for plaintiff in error, were stopped by the court.

D. B. & H. M. Duffield, for defendant in error.

CHRISTIANCY, CH. J.

The plaintiff in error, as the surviving partner of the firm of Emil Toeser & Co., brought his action in the circuit court for the county of Wayne, for a trespass committed by Steiner, by entering into a certain brick store in the city of Detroit, which plaintiff and his deceased partner had leased from the defendant for a term which had not yet expired.

The declaration was special, setting forth the facts of the leasing, the death of Toeser, the other member of the firm, on the 15th of March, 1872; that the firm was in possession and use of the property at the time of Toeser's death, and that plaintiff, as sole surviving partner, continued in the lawful and peaceable possession, and was so in possession at the time of the trespass, April 2d, 1872.

This declaration was demurred to on the ground that the plaintiff had sued alone, and that it appeared upon the face of the declaration that the representatives of the

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deceased partner should have been joined as co-plaintiffs. The circuit court sustained the demurrer, and the plaintiff brings the case here by writ of error.

The only ground upon which the counsel for the defendant in error relies in support of the demurrer is, that as to choses in possession the surviving partner is a tenant in common with the representatives of the deceased partner, for which he cites *1 Parsons on Contracts, 202; Story on Part.*, § *346*, and *Parsons' Mercantile Law.* However this may be, after the partnership business has been settled and its debts fully paid, and when the representatives have been let into joint possession by the surviving partner, we think it very clear that until the partnership has been thus settled, and all the debts paid, the representatives of the deceased partner have but an equitable interest in such property, which, though in equity it may make them tenants in common, subject to the debts of the firm and a final settlement, does not constitute them tenants in common at law; and until such settlement and payment of all debts at least, they have no right of possession; and the right of action at law for any trespass upon, or injury to, the property, is vested solely in the surviving partner. Whether this would be so after the full settlement of the partnership and payment of debts, until such representatives should be let into joint possession, we need not decide; as this does not appear, nor is there any thing in the declaration from which we can infer any such facts. All the allegations furnish an opposite inference. The demurrer is so clearly without any basis of law for its support that it would be idle to cite authorities for our conclusion.

The circuit court erred in sustaining the demurrer, and the judgment must be reversed, with costs.

The other Justices concurred.

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Oscar F. Stanton v. Michael Hart.

Malicious prosecution: Arrest: Nolle prosequi: Acquittal. An action will lie for malicious prosecution where a person has been arrested on a criminal charge, and discharged on a *nolle prosequi*, after efforts to procure a trial. It is not necessary that he should have been tried and acquitted.

Malicious prosecution. The action lies whenever the proceeding has come to an end by a discharge, whatever may be the form of its termination. Any other rule would enable all the mischief to be done without remedy.

Declaration: Variance. Where the declaration averred that the plaintiff had been "*acquitted and discharged*," but showed such further facts as indicated that there had been a discontinuance, and not a trial and acquittal, it was held no variance to prove such discontinuance. The terms are to be understood according to their context, and the meaning was plainly to be drawn from the whole count.

Malicious prosecution: Advice of counsel: Pettifoggers. The law presumes that members of the bar have more knowledge of law than laymen, and an honest reliance on their advice will justify a prosecution.

But it does not presume that a layman who is a pettifogger knows more law than other laymen, and his advice will not justify.

Malice: Evidence. Where a party before procuring an arrest uses every means in his power to inform himself, and acts honestly, such conduct will have its weight in disproving malice.

Heard July 22 and 23. Decided July 25.

Error to Saginaw Circuit.

Wisner & Draper, for plaintiff in error.

Frederic L. Eaton and *Albert Trask*, for defendant in error.

CAMPBELL, J.

Hart sued Stanton for malicious prosecution, in having him arrested for larceny, from which after much delay he was finally discharged upon a *nolle prosequi*, after having endeavored without success to obtain a trial. A recovery was had at the circuit, and the case comes up on error.

The first question presented is whether such an action will lie unless the plaintiff has been acquitted on trial by a jury. Upon this question there is some conflict in the authorities, but we think the weight of reason is in favor

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of the action. The mischief is done by the arrest and disgrace caused by a charge of crime, and by the expense and annoyance attending the proceeding. A discharge without a trial does not destroy the effect of the mischief, but often aggravates it by leaving the party injured without the complete vindication of a verdict in his favor. As long as the proceedings are pending, it may be considered that there may possibly be a conviction under them, which would justify the accusation. But as soon as the proceedings have come to an end, by such an order or discontinuance as will prevent a further prosecution without a new complaint, there is no longer occasion for any such presumption. It is more reasonable to assume it has been found that the charge ought not to be further pressed. And it would be doing great injustice to refuse a remedy for such a wanton injury to liberty and reputation, on a ground which is purely technical, and is not reasonable. The doctrine is very well explained in *Clark v. Cleveland, 6 Hill, 344,* as allowing an action whenever the particular proceeding has come to an end, so that the prisoner can be no further pursued upon it. Discharge by a magistrate, discontinuance of a private action, and ignoring bills by grand juries, when the party is discharged, have all been made the basis of an action for malicious prosecution.—*Smith v. Ege, 52 Pa., 419; 1 Am. Lead. Ca., 221; Straus v. Young, 36 Md., 246; Burhans v. Sanford, 19 Wend., 417; Fay v. O'Neill, 36 N. Y., 11.* We think the action was not premature.

It is claimed, however, that the declaration counted upon an acquittal, and not upon a *nolle prosequi.* If this objection had been pointed out on the trial, so as to raise a question of variance, it would have been a matter of course to allow an amendment if one had been needed. The objection raised in the circuit went only to the ground of action, and not to the conformity of proofs and allegations, and cannot be properly urged now on error, upon any new ground.

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We think the declaration, although it uses the phrase, "acquitted and discharged," shows beyond mistake that no reference was had to an acquittal on a trial. The language is, that the prosecutor "neglected to bring the same on to a hearing or trial, and the said plaintiff, being innocent of said supposed offense, was then and there duly discharged out of said custody, and fully acquitted and discharged of the said supposed offense; and the said defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is wholly ended and determined." These allegations are preceded by statements of the delays to which plaintiff had been put by defendant in trying to have the complaint brought to trial. If the word "acquitted" has a technical meaning when unexplained, it is impossible to read the declaration as conveying that meaning, and it can only be made sensible by taking the whole clause together.

The other errors alleged relate to the exclusion of certain testimony in justification. The court refused to allow evidence that Stanton consulted with one Curry upon the question of the guilt of the plaintiff, and that "said Curry, who is a business man at Clio, in Genesee county, advised him to commence the prosecution."

There is no possible ground for admitting such evidence, even had it been shown that Curry knew the facts. The natural, as well as legal presumption, must be that Stanton himself knew as much about law as any other man of no special legal knowledge.—*Wills v. Noyes, 12 Pick., 324.*

But the court also excluded evidence of advice from one Richard Sparks, who was a farmer with no legal training, but who had practiced for several years in pettifogging before justices of the peace, and had done some business for Stanton in that capacity. This was offered in justification, counsel declaring that he did not wish to introduce it in mitigation.

The law allows honest action upon the advice of counsel who have been fully informed on the facts, to be a

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complete justification, upon the sole ground that a person has done all he could be expected to do to enable him to act safely. But it is not the policy of the law to permit innocent men to be subjected to false charges and unfounded arrests; and a person who assumes to prosecute is bound to use all reasonable means to avoid committing such a grievance. Every man of common information is presumed to know that it is not safe, in matters of importance, to trust to the legal opinions of any but recognized lawyers; and no matter is of more legal importance than private reputation and liberty. When a person resorts to the best means in his power for information, it will be such a proof of honesty as would disprove malice, and operate as a defense proportionate to his diligence. But there is no respectable authority for holding that advice from any but a qualified lawyer is of itself an answer to the charge of malicious prosecution, however honest the course of the party may have been in seeking for it. Such advice bears upon probable cause, while the other excuses go to disprove malice.

It would be very dangerous to relax the rules on this subject. There can never be any difficulty in finding professional advisers under ordinary circumstances. And where the prosecution complained of is criminal, and not civil, there is still less cause for removing any safeguard against oppression and vexatious proceedings. This rule originated in England, where there is no public prosecutor, and where all complaints must usually be made by private parties. They were compelled to employ counsel to prosecute, and it would have been unjust to compel them to do more than use proper diligence and fairness in choosing and instructing them. But under our system all prosecutions are put under official control, and a principal reason for this was the abuses of private prosecutions, which are very apt to be set on foot for private purposes rather than for the public good. It can rarely happen that in serious cases where there is any such doubt as would render it prudent to seek

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advice before acting, it will not be easy to get access to the prosecuting attorney. The very fact that a person is in doubt, should teach him more caution, and lead him to communicate with the proper authorities, and put the care of the prosecution where it legally belongs. There is no need in such cases to rely on irregular advisers, and it is a practice not to be favored. The authorities are too numerous to need citation. The cases of *Straus v. Young, 36 Md., 246*, and *Olmstead v. Partridge, 16 Gray, 381*, are recent decisions, explaining the rule very clearly.

The case shows that one lawyer *was* consulted, and his advice was held within the rule.

There is no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

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ATTACHMENT.

1. A service of a copy of the inventory alone is not a sufficient personal service of an attachment under the statute (*Comp. L. 1871, § 6402*); a copy of the attachment is required also, and the statute must be followed substantially.—*Stearns v. Taylor, 88.*
2. Service of an attachment upon property cannot be made in a foreign county until after service has been made in the county where the process issued; service in a foreign county in the first instance cannot be made the basis for proceeding by publication.—*Ibid.*
3. Appearance of a defendant in such case to enter default of the plaintiffs for not declaring, does not preclude him, after the default has been set aside under a stipulation that his appearance should not waive any irregularity or defect in the process or proceedings, from making any objection to the proceedings which he could have made on a special appearance to complain of defects.—*Ibid.*
4. A dismissal of the cause in which such proceedings had been taken, seven months after the return day of the writ, is not error.—*Ibid.*
5. In proceedings before a circuit court commissioner under the statute (*Comp. L. 1871, §§ 6428–31*) for the dissolution of an attachment issued upon an affidavit that "the plaintiff has good reason to believe that the defendant has absconded from the state," etc., a showing that the defendant had not in fact absconded, will authorize an order of dissolution, notwithstanding the plaintiff had good reason to believe to the contrary.—*Folsom v. Teichner, 107.*
6. The provision of the statute (*Comp. L. 1871, § 6430*), that if the commissioner "shall be satisfied that such plaintiff has not a good and legal cause for suing out the writ," he may order the attachment dissolved, etc., refers to the state of facts made to appear at the hearing before him, and not what appeared to the plaintiff when the affidavit was made; and the "good and legal cause" must be one existing in fact, and not merely in the belief of the plaintiff, however well founded that belief may have appeared to him to be.—*Ibid.*

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1. A client who puts his case against another into the hands of an attorney for suit is presumed to authorize and sanction such action as the latter, in his superior knowledge of the law, may

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decide to be legal, proper and necessary in the prosecution of the demand; and whatever adverse proceedings the attorney may take are to be considered, so far as they affect the defendant in the suit, as approved in advance by the client, and therefore as his act, even though they prove to be unwarranted by the law; as to trespasses upon third parties, the rule is different.—*Foster v. Wiley*, 244.

2. A client is held liable in this case in trespass for the taking of plaintiff's property upon an execution issued by a justice of the peace at the instance of the attorney, after an appeal had been perfected.—*Ibid.*
3. The limits to the implied authority of an attorney in ordinary cases of suits brought to enforce money demands pointed out and authorities cited.—*Ibid.*
4. An attorney employed to carry a suit through for an agreed sum has a vested right to the compensation when he accepts and begins the service; and the subsequent appointment of such attorney to a position where it would become his official duty thereafter to conduct such suit to its termination by virtue of his general employment, would not prevent him from recovering the sum agreed upon under the private contract; but if the original employment were to conduct the suit to its termination for such compensation as the services should be reasonably worth, he could only recover the value of his services prior to such appointment.—*Detroit v. Whitemore*, 221.
5. The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business.—*Ibid.*

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BILL IN EQUITY.

1. An injunction bill, brought by a number of owners of mills and factories along a stream, to enjoin various acts which are alleged to have rendered the water-power by which their machinery is operated of little value to them, and which does not ask for an accounting, is not demurrable on the ground that the complainants have no common interest; nor on the ground that other parties are interested who should be joined.—*Middleton v. Flat River Booming Co.*, 533.
2. A demurrer to such a bill because it does not show that complainants have no adequate remedy at law cannot be sustained, as it is apparent that only an injunction can be an adequate remedy.—*Ibid.*
3. Where the bill sets forth facts showing a direct and unquestionable injury, a demurrer to it cannot be sustained on the ground that the acts complained of were authorized by the act under which the defendant corporation was organized, since the incorporation act cannot be understood as intending to authorize the destruction of vested rights of property.—*Ibid.*
4. On a stream which is valuable for floatage, but not for navigation in the more enlarged sense, it cannot be said that the right of floatage is so far paramount to the use of the water for machinery as to authorize the sacrifice of the latter to the former interest.—*Ibid.*
5. Such a bill which avers that the water is detained by dams above complainants' mills, so as virtually to amount to a drying up of the

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stream, and to destroy its value as a means of furnishing water-power while the water is thus detained, and that very much is thereby lost by percolation and evaporation, is not demurrable for want of sufficient allegation of damage.—*Ibid.*

6. The objection that the location and description of the dams complained of are not given in such a bill, is not well taken.—*Ibid.*

See EQUITY PLEADING AND PRACTICE, 4.

BILL OF EXCEPTIONS.

It will not be presumed that the bill of exceptions does not contain all the evidence, where the form and wording of it indicates that the whole testimony of each witness is given *verbatim*, and it concludes with the recital that "the evidence was here closed."—*Carter v. Snyder, 484.*

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BONA FIDE PURCHASER.

A purchaser who has notice that another has claims upon the property, and that certain unrecorded papers relating thereto have been executed, but who, without seeing those papers, or inquiring into the nature of such claims, sees fit to buy upon the assumption that they relate only to a mortgage of record in favor of the same person, is not entitled to be protected as a *bona fide* purchaser, against such claims.—*Hosley v. Holmes, 416.*

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1. The resolutions of the common council of Detroit, of October 1st, 1864, providing for the payment of three hundred dollars bounty

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to each person who, since September 31st, 1864, had been, or thereafter should be enlisted and credited to any ward in the city, were not intended for the benefit of the wards of the city, but of the individual enlisting, and this bounty is in addition to the amount of ward bounty any ward had undertaken to pay; a contract with any ward, therefore, to fill its quota, would give the contractor no title to the city bounty provided by such resolution to be paid to one who had enlisted and been credited to such ward.—*Roberts v. Field*, 337.

2. The resolutions aforesaid, when considered together and in the light of the existing legislation (which is referred to in the preamble) and of the surrounding circumstances, cannot be held to have intended to provide the bounty for the benefit of those only who should furnish persons to enlist, so as to preclude the enlisted man from claiming it where he had enlisted of his own free will and had not been "furnished" by any other person.—*Ibid.*
3. One enlisting of his own motion and without the solicitation of another, may well be said to have "furnished" himself, within the meaning of said resolutions.—*Ibid.*
4. The assignment of the certificate of enlistment and the bounty to be paid thereon, in this case, was held not to be conclusive between the parties, but to be open to explanation by oral evidence like a mere receipt.—*Ibid.*

BOUNTY BONDS.

Under the statute (*Comp. L. 1871*, §§ *3927-36*) authorizing the payment of bounties to volunteers, etc., the bonds provided for are intended to be put upon the footing of established liabilities against the township, to be presented, like other claims, for orders on the treasury, to the township board; and an action against the township is not the proper remedy to enforce payment; but the proper redress for any refusal of the town officers to do their duty in this regard is by *mandamus*.—*Dayton v. Rounds*, 82.

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BREACH OF PROMISE TO MARRY.

1. Seduction may be proved in aggravation of damages in an action for breach of promise to marry.—*Sheahan v. Barry*, 217.
2. When a man breaks off an engagament after he has seduced the woman, and does so on grounds furnishing no excuse or reason, if he on the trial produces evidence of her previous incontinence

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before or during the engagement, of which he had no knowledge or suspicion before he broke it off, such evidence, if believed, will go in mitigation only, and not in bar of damages.—*Ibid.*

3. Marriage by one of two engaged persons to a third person is a breach of promise which puts it out of his power to perform the engagement, and is therefore of itself an immediate ground of action.—*Ibid.*

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1. A prosecution under "An act to prevent the careless use of fire-arms" (*Comp. L.*, § *7550*) cannot be had, and there can be no lawful conviction under it, where the use is not careless, but intended and malicious.—*People v. Chappell*, *486*.
2. In such prosecutions the absence of malice is a statutory requisite, and no statutory ingredient of any offense can be disregarded. If lacking, the offense cannot exist.—*Ibid.*
3. The statutory provision (*Comp. L.*, § *7919*) that no person shall be acquitted of a misdemeanor because the proofs show a felony, cannot apply to a statutory offense where the misdemeanor could not be included in any felony, and where the offense proved would be inconsistent with that charged, instead of being an aggravation of it.—*Ibid.*

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1. *Certiorari* will not lie to review proceedings of a circuit court commissioner in dissolving an attachment, to try the title to the goods attached, upon a claim of the plaintiff in attachment that the goods are his own. An attachment is not the proper process to obtain possession of goods which the plaintiff claims are his property; his remedy is replevin.—*Mendelsohn v. Smith*, 2.
2. A *certiorari* to review proceedings whereby a new school district has been created out of old districts must be applied for before the district has been organized and assumed the functions of a corporation; after that time the proper course is, to take measures to try the legality of its corporate existence by *quo warranto*, or other direct proceedings against the alleged corporation or its officers.—*Fractional School Dist., etc. v. School Inspectors, etc.*, 3.
3. The action of the auditor general in charging back to a county certain taxes, in his settlement with the county, being the exercise of an official discretion belonging to an executive department of the state government, is not subject to judicial review, and cannot, therefore, be examined upon *certiorari*.—*Supervisors of Midland County v. Auditor General*, 165.

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4. In *certiorari* to review the proceedings of a commissioner upon a *habeas corpus* to inquire into the cause of the imprisonment of one held on an execution from a justice's court in an action of replevin, the statement in the affidavit for the *certiorari*, of the contents of the justice's docket in the replevin suit, cannot be received as evidence of what such contents were unless adopted by the return as true.—*Tomlin v. Fisher*, *524*.

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1. It is not error to refuse to repeat, on separate requests, charges already fully given in as intelligible form.—*Leonard v. Pope*, *145*.
2. A court cannot charge as a question of law upon inferences to be drawn from physical symptoms. If they are intelligible without medical testimony, they are for the jury and not for the court to interpret.—*Sheahan v. Barry*, *217*.
3. A court cannot be required to direct the jury not to be governed by their sympathies, but to disregard them, where they are sufficiently cautioned that they must be governed by proof.—*Ibid.*
4. No evidence having been given tending to show any defense to the plaintiff's claim, the jury should have been instructed that if they believed the plaintiff's evidence (which was wholly uncontradicted), they should find a verdict in his favor.—*Roberts v. Field*, *337*.
5. A charge to the jury is to be considered together as a whole; and if an erroneous statement in one part of it is so naturally and intimately connected in sense with others explanatory thereof, as to be understood by the jury as intended to be considered together, and as relating to the same point, and the charge considered as a whole is in substantial compliance with the requests of the party complaining of such error, his objection will not be sustained.—*McGinnis v. Kempsey*, *363*.
6. Where there was no evidence tending in any way to prove justification, it was improper to give any charge on the subject; but this was not an error against defendant.—*Johnson v. McKee*, *471*.
7. When witnesses are contradictory, it is proper to caution the jury concerning the care to be used in considering the testimony.—*Ibid.*

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See SEDUCTION, 1-7.

CHATTEL MORTGAGES.

1. The description of property in a chattel mortgage, after enumerating certain articles specifically, concludes, "carpets, bedding, bedroom furniture and other personal property in and about said house and premises; except herefrom such personal property as is exempt from execution by the laws of the state of Michigan, to wit: stoves in use, family pictures, library and school books, clothing, provisions, fuel and sewing machine; also excepting household goods, furniture and utensils therein, of the value of two hundred and fifty dollars;" the mortgagors had at the time in said house two hundred and fifty dollars worth of goods, furniture and utensils, besides the enumerated articles and those exempt from execution:—

   Held, That, construing this mortgage in the light of the facts found, the exception applies to the property described generally, and not to the articles specifically enumerated, and that the specific articles are intended to be mortgaged unconditionally.—*Giddey v. Uhl*, 94.

2. A finding of facts which shows that a chattel mortgage was assigned to the plaintiff for a valuable consideration, in the absence of any showing that there was any other instrument to which the mortgage was collateral, will be construed as a finding of an assignment which was effectual to pass the interest of the mortgagee, and is not open to the objection that it fails to show an assignment of the debt, and is therefore insufficient; it will not be presumed in such case that the mortgage was collateral to any other instrument; on the contrary, the presumption is the other way.—*Ibid.*

3. Whether the assignment of a mortgage collateral to some other instrument by which the debt is witnessed does not convey the mortgage to the assignee, as trustee for the owner of the debt, so as to authorize that trustee to maintain a suit at law for the property or its proceeds:—*Quære?*—*Ibid.*

See FIXTURES, 2.

CHILDREN.

See STREET RAILWAYS, 2-5.

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CIRCUIT COURT COMMISSIONER.

See ATTACHMENT, 5, 6: CERTIORARI, 4: POSSESSION OF LAND, 7-10: PROHIBITORY LIQUOR LAW, 3.

CIRCUIT JUDGE.

See EQUITY PLEADING AND PRACTICE, 1: PRACTICE IN CIRCUIT COURTS, 12, 13.

CITY.

See CONSTITUTIONAL LAW, 1, 2.

CITY COUNSELOR.

1. The city counselor of Detroit being required by the city ordinances to appear as attorney and counsel in behalf of the city in all suits, prosecutions or proceedings, brought in any circuit court or the supreme court of the state, or in any United States court, by or against the city, or any board thereof, etc., and to prosecute or defend therein, to the termination thereof, and his official bond being required to be conditioned for the performance of all his duties as prescribed by the charter and ordinances, one who has, previous to his appointment as such counselor, been employed to bring and carry through to its termination a suit in behalf of the city, cannot recover on a *quantum meruit* for services in said suit performed after he became city counselor, in the absence of any agreement that the business of carrying on such suit, though falling within his official duties, should not be considered as included among the services paid for by the annual salary, but should be compensated for in some other way.—*Detroit v. Whittemore, 281.*
2. Where the duties performed by one holding the position of city counselor are official duties, such as that officer is by law required to perform, and such as by his official bond he has agreed to perform, it is impossible to infer, in the absence of any express contract to that effect, entered into when he accepted the appointment, that such duties were to stand apart from the official duties in general, and to be paid for separately, because of some previous understanding which was had when the official appointment was not contemplated; all such previous understandings will be regarded as terminated by and merged in the appointment, unless otherwise expressly agreed.—*Ibid.*
3. In this suit, which is framed and conducted on the theory that the services for which recovery is sought were excepted by the previous understanding, from the official duties of city counselor for which the salary was intended as compensation, and not on the theory that no compensation was fixed and allowed by the

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city authorities for the performance of the official duties, it is immaterial that it was not shown by the city that any official salary was paid to the plaintiff; the compensation fixed for the performance of the duties of city counselor covers so much of the services in question as were performed after the appointment of the plaintiff to that office.—*Ibid.*

See ATTORNEY AND CLIENT, 4.

CITY OF DETROIT.

See CITY COUNSELOR, 1-3: PLAN OF DETROIT, 1-6.

CIVIL SUIT.

See CRIMINAL PROCEEDINGS, 1-4: FALSE IMPRISONMENT, 1: JURISDICTION, 3: PROHIBITORY LIQUOR LAW, 1.

CLIENT.

See ATTORNEY AND CLIENT, 1-3.

COLLATERAL ATTACK.

See JURISDICTION, 1-3.

COLLATERAL ISSUE.

See FORGERY, 1.

COLLUSION.

See CONTRACTS, 2.

COMBINATIONS.

See CONTRACTS, 2.

COMITY.

See FOREIGN COURTS, 1.

COMMISSIONERS.

See HIGHWAYS, 4.

COMMON COUNCIL.

See PLAN OF DETROIT, 1-4.

COMMON COUNTS.

See DECLARATION, 8, 9.

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COMPENSATION.

See ATTORNEY AND CLIENT, 4: CITY COUNSELOR, 1-3.

COMPETITION.

See CONTRACTS, 2.

COMPLAINT.

See CRIMINAL PROCEEDINGS, 4: JURISDICTION, 1, 2: POSSESSION OF LAND, 1.

COMPUTATION OF TIME.

See JUSTICE OF THE PEACE, 2-4.

CONDITIONAL SALES.

See REPLEVIN, 5, 6: TROVER, 9.

CONDITION PRECEDENT.

See SALES, 3, 4.

CONSIDERATION.

See DECLARATION, 7: EVIDENCE, 13: FORGERY, 2: NOVATION: PRACTICE IN CIRCUIT COURTS, 1, 2: PROMISSORY NOTES, 5-9: RESTRAINT OF TRADE, 2-4.

CONSTABLE.

See OFFICER: SHERIFF, 1.

CONSTITUTION CONSTRUED.

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Art. III., § 37; Filling vacancies. 122
Art. X., § 3; County officers. 122

CONSTITUTIONAL LAW.

1. The legislature have no authority to pass statutes authorizing townships or cities to pledge their credit in aid of the construction of a railroad; such legislation is void, both upon the fundamental principles underlying the taxing power, and also upon specific provisions of our state constitution.—*Thomas v. Port Huron*, 320.
2. The fact that a city has received in exchange for void bonds issued under such an enabling act, the bonds of the railroad company in whose favor the city bonds were issued, does not make valid the unauthorized obligations of the city. A municipal corporation has no general authority to exchange promises

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with other corporations or persons; its contract, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes.—*Ibid.*
See HOMESTEAD, 1–4: OFFICE, 2.

CONSTRUCTION OF STATUTES.

See JUSTICE OF THE PEACE, 3.

CONTRACTOR.

See MASTER AND SERVANT.

CONTRACTS.

1. An agreement whereby A is to enter into and perform a contract with the state for the construction of a swamp-land state road, and to give B, who, at the public letting of the work, under the statute, had been the lowest bidder, as a bonus for being allowed to take his place in the contract, a portion of the swamp lands to be secured from the state for the performance of the work, is void as being against public policy.—*Hannah v. Fife, 172.*
2. Secret collusive agreements and combinations between proposed bidders to prevent competition at the letting of contracts for public work considered, and the principles upon which they are held void discussed.—*Ibid.*
3. The statutes (*Sess. L. 1859, p. 315, § 7; Sess. L. 1863, p. 380*), providing that contracts to construct swamp-land state roads shall "in all cases be let to the lowest responsible bidder," do not admit of the substitution of another person as contractor in place of such bidder; and any contract based upon such illegal substitution is void.—*Ibid.*
4. Whether a stipulation in an agreement, to use one's efforts and influence to get a contract with the state confirmed, and to use no influence or effort to defeat it, would, of itself, render the agreement in which it occurs void:—*Quære?*—*Ibid.*
5. Such a stipulation, however, relating to the consummation and approval of an illegal contract, cannot be considered unobjectionable in deciding upon the validity of the agreement containing it.—*Ibid.*
6. The contract in this case, for the cutting, running and delivery of certain logs by the first party, and for the advancing of money therefor, and the sawing and manufacturing of the same into lumber, and the shipping and sale thereof by the second party, and for the distribution of the proceeds, is construed to intend that the deductions therein provided for on account of advances made, charges, freight, insurance, etc., were to be taken from the gross undivided proceeds of sales, and not from the share of

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the second party alone.—*Hersey v. Huron Salt & Lumber Manufacturing Co.*, *490*.

See ESTOPPEL: EVIDENCE, 1–4; 10: LIENS, 1–4: MANDAMUS, 1–3: MECHANIC'S LIENS, 3: PARTNERSHIP, 2: POSSESSION OF LAND, 3: REPLEVIN, 5, 6: RESTRAINT OF TRADE, 1–5: STIPULATED DAMAGES, 1: SUNDAY: TRESPASS, 1: TROVER, 8, 9,

CONTRIBUTION.

See SURETIES, 1–3.

CONTRIBUTORY NEGLIGENCE.

See STREET RAILWAYS, 2–5.

CONVERSION.

See DAMAGES, 1: REMEDY, 2: TROVER, 1, 2–4, 6–8, 9–13.

CORPORATIONS.

Under the railroad law of 1871 (*Comp. L. 1871*, § *2405*) subscriptions to capital stock of a railroad corporation could only be made "in the manner to be provided by its by-laws." A subscription made before any by-laws were adopted gave no rights to either party; and where there had been nothing done to create an estoppel, the subscriber was held not bound by a by-law made afterwards and adopting his subscription.—*Carlisle v. Saginaw Valley & St. Louis R. R. Co.*, *315*.

See BILL IN EQUITY, 3: CERTIORARI, 2: CONSTITUTIONAL LAW, 2.

COSTS.

1. The statute (*Comp. L. 1871*, § *5375*) in relation to taxable costs in justice's courts, was intended merely to prevent the accumulation of needless costs, and to limit the party as to such as are within his control; the jury fees, court fees and officers' fees for serving any process other than subpœnas are meant to be excepted from the limitation, and are taxable.—*Overpack v. Ruggles*, *65*.
2. Where the only defense set up to an action of assumpsit is a settlement, and that subsequently defendant did work for plaintiff to the amount of twenty-one dollars, and the court instructs the jury that if they find the settlement sustained they should throw out all matters upon either side that entered into that settlement, and then find a balance one way or the other as to the items of deal after the settlement, and the jury find a verdict for plaintiff for only twenty-five dollars, it cannot be said that the plaintiff

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is entitled to full costs on the ground that he established a claim of one hundred dollars, which was reduced by set-off.—*Carter v. Snyder*, *484*.

See JUSTICE OF THE PEACE, 6, 7: PRACTICE IN SUPREME COURT, 14, 16, 17.

CO-SURETIES.

See SURETIES, 1–3.

COUNSEL.

See ATTORNEY AND CLIENT, 1–5: CITY COUNSELOR, 1–3.

COVENANTS.

See DECLARATION, 9: LANDLORD AND TENANT, 1.

CREDIBILITY OF WITNESSES.

See PRACTICE IN CIRCUIT COURTS, 18.

CREDITORS.

See FRAUDULENT SALES, 1, 2.

CRIMINAL LAW.

See CARELESS USE OF FIRE-ARMS, 1–3: EVIDENCE, 21, 22: FORGERY, 1–3: INFORMATIONS: PRACTICE IN SUPREME COURT, 12, 18: SEDUCTION, 1–7.

CRIMINAL PROCEEDINGS.

1. Proceedings under the statute (*Comp. L. 1871*, § *1998*), to enforce a penalty for keeping billiard tables, etc., are criminal in character; the judgment provided for, being both a fine and security for good behavior, etc., for a year, is an entirety, and no right to prosecute separately for the fine is prescribed; such a judgment is peculiar to criminal remedies and quite foreign to those of a civil nature.—*Pardee v. Smith*, *33*.
2. Neither section 5268 nor section 6843 of the Compiled Laws of 1871 warrant the recovery of such a judgment in a civil suit.—*Ibid.*
3. Justices of the peace have not jurisdiction to try and determine cases under the statute in question (*Comp. L. 1871*, § *1998*); the statute (*Comp. L. 1871*, § *5525*, *sub. 8*) giving them authority to hear and determine "all other offenses punishable by fine not exceeding one hundred dollars, or punishable by imprisonment in the county jail not exceeding three months, or punishable by

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both said fine and imprisonment," does not include such an offense.—*Ibid.*

4. A complaint and warrant based upon this statute are to be construed as preliminary steps in a criminal procedure looking to an examination, as provided by chapter 259 of the Compiled Laws of 1871, and not to a trial before the justice; and the intervention of the prosecuting attorney is not essential to their validity.—*Ibid.*

See FALSE IMPRISONMENT, 1: PROHIBITORY LIQUOR LAW, 1.

CROSS-APPEAL.

See PRACTICE IN SUPREME COURT, 5.

CROSS-EXAMINATION.

See EVIDENCE, 17: STIPULATION.

DAMAGES.

1. Defendants who have sold property and are sued for its conversion, are not liable for value beyond what it would have been before, or at the time and place of conversion. Value subsequently and elsewhere is not material.—*Greeley v. Stilson, 153.*
2. A ruling that plaintiff could recover no damages for injured feelings or mental anxiety, if the assault was made on provocation, is not one which defendant could object to.—*Johnson v. McKee, 471.*

See BREACH OF PROMISE TO MARRY, 1, 2: EVIDENCE, 1–4, 15, 18: JUDGMENT, 1: LANDLORD AND TENANT, 4: LIENS, 4: SLANDER, 2: STIPULATED DAMAGES, 1, 2: TROVER, 5, 12, 13, 14.

DAMS.

See BILL IN EQUITY, 1, 6: RIPARIAN RIGHTS, 1–4.

DECLARATION.

1. A declaration cannot be set aside on motion, for variance from the writ in the form of action; such variance in non-bailable actions, is entirely immaterial; and even in bailable actions it would operate only to discharge the bail, and not to render the declaration a nullity.—*Smith v. Judge of Wayne Circuit, 87.*
2. A declaration upon the common counts cannot be amended so as to set forth a new and distinct cause of action upon a special contract which has become barred by the statute of limitations since the original declaration was filed; this would be to permit the fiction of relation to nullify an act of the legislature.—*Gorman v. Judge of Newaygo Circuit, 138.*

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3. A declaration upon the common counts in assumpsit, and one upon a special contract, are for distinct and different causes of action, where the basis of recovery under the latter is such that there could be no recovery under the former.—*Ibid.*

4. The fact that the notice attached to the plea to the original declaration set up as a defense the same special contract counted upon by the amended declaration, could have no tendency to show that the cause of action was the same in both, or that the amendment should have been allowed; on the contrary, the facts set up in the notice being in accord with the new declaration, and at the same time such as, if proved, would preclude a recovery under the common counts, its tendency is the other way.—*Ibid.*

5. It is competent for the court to allow a declaration for false imprisonment to be amended by adding a new count for malicious prosecution arising out of the same transaction, at any time before the new cause of action has become barred by the statute of limitations.—*Long v. Judge of Wayne Circuit, 164.*

6. Under a declaration in assumpsit for money had and received, which describes the plaintiff as administratrix, etc., but sets forth an indebtedness and promise to the plaintiff only, precisely as if she were suing in her individual character, it seems that no recovery can be had for money received to the use of the decedent during his lifetime.—Per GRAVES, J.—*Barnum v. Stone, 332.*

7. It is not essential that a declaration upon the common counts in assumpsit should set forth what was the consideration for an alleged promise; and an objection to evidence of the consideration, upon that ground, is untenable.—*Crane v. Grassman, 443.*

8. One who has made repairs upon his own store under an arrangement with his tenant that he should make such repairs, and that the tenant might thereupon surrender his lease, and in consideration thereof should pay him for the repairs, may recover of the tenant the cost of the repairs, under the common counts in assumpsit, without setting up the special circumstances.—*Ibid.*

9. One who has voluntarily paid a mortgage upon land conveyed to him by a deed containing a covenant against encumbrances, cannot recover the amount thereof of his grantor upon the general count for money paid to his use; where there is a special contract between the parties, there can be no recovery upon a general count for money paid to the use of defendant, except in cases where there could have been a recovery in the absence of any special contract.—*Carney v. O'Neil, 495.*

See EVIDENCE, 15: MALICIOUS PROSECUTION, 3: PARTNERSHIP, 4.

DECREE.

See ACCOUNTING: EQUITY PLEADING AND PRACTICE, 4: PRACTICE IN SUPREME COURT, 5–7.

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DEDICATION.

See HIGHWAYS, 1: PLAN OF DETROIT, 1.

DEEDS.

Where the initial point in the description of premises in a deed is the south-east corner of the north half of the south-east quarter, fractional, of a section, and the quarter section is made fractional by a meandered lake, so situated as to cover the eastern and central portions thereof, and the parcel described was carved out of the north half within a year after the same was patented, the south-east corner in question is construed to be the point which constituted the south-east corner of the land as it was surveyed out and patented by the government, which locates it on the meandered line of the lake; and the fact that the waters of the lake have since receded, cannot change the boundaries of the lands described, as previously located.—*Verplank v. Hall*, 79.

See DELIVERY, 1-3: FRAUD, 4: POSSESSION OF LAND, 2-5: RENTS AND PROFITS: TROVER, 6, 7.

DEFAULT.

See ATTACHMENT, 3: JUDGMENT, 1: LANDLORD AND TENANT, 3: PRACTICE IN CIRCUIT COURTS, 10: PRACTICE IN SUPREME COURT, 6.

DELIVERY.

1. A delivery of a deed to a third person for the benefit of the grantee, in the absence of any thing conveying a different intent, is as much a delivery as if made to the grantee himself; and when papers show upon their face that they are intended to take effect and operate from their execution, it will not be presumed that their delivery to a third person to be afterwards delivered to the parties, was merely as an escrow, and that they were not to take effect until such subsequent delivery.—*Hosley v. Holmes*, 416.
2. An agreement that a deed given as security, and a bond intended to show the purpose of the deed and the nature of the transaction, should be left with a third person until a time specified, and then to be delivered to the parties, unless within the time they were called for by both parties together, cannot be said to be unconscionable if construed according to its purpose and intent; and such an agreement shows at least that no control of the papers, or right to recall them, was retained by the grantors.—*Ibid.*
3. A provision in such a bond that in case of payment of the indebtness secured by the deed, the grantee named in the deed was to deed the property back, is inconsistent with an intent that the deed was to have no effect until after such subsequent delivery.—*Ibid.*

See SALES, 2-4.

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DEMAND.

See POSSESSION OF LAND, 9: TROVER, 2, 3.

DEMURRER.

See BILL IN EQUITY, 1–6: PARTNERSHIP, 4.

DESCRIPTION.

Of premises: See DEEDS, 1.
Of property: See CHATTEL MORTGAGES, 1.

DETENTION OF WATER.

See BILL IN EQUITY, 5.

DETROIT.

See CITY COUNSELOR, 1–3: PLAN OF DETROIT, 1–6.

DIFFERENT CAUSES OF ACTION.

See DECLARATION, 2–4.

DISCHARGE.

See PAYMENT, 1.

DISCRETION.

See CERTIORARI, 3: EVIDENCE, 17: PRACTICE IN CIRCUIT COURTS, 4, 8, 9, 24: PRACTICE IN SUPREME COURT, 4: WITNESS.

DISMISSAL.

Of appeals: See PRACTICE IN CIRCUIT COURTS, 6–8, 16–18: REMEDY, 1. See ATTACHMENT, 4.

DISSOLUTION.

See ATTACHMENT, 5, 6.

DOCKET ENTRY.

See JUSTICE OF THE PEACE, 5.

DOUBLE REMEDIES.

See PRACTICE IN CIRCUIT COURTS, 23–25.

DRAINAGE.

See RIPARIAN RIGHTS, 1, 2.

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DRAWING LOTS.

See OFFICE, 1-3.

DREDGING.

See MECHANIC'S LIENS, 2.

ELECTION OF REMEDIES.

See PRACTICE IN CIRCUIT COURTS, 25.

ELECTIONS.

See OFFICE, 1-9: QUO WARRANTO, 1-5.

EMPLOYMENT.

See ATTORNEY AND CLIENT, 4, 5: CITY COUNSELOR, 1-3.

ENCUMBRANCES.

See FRAUD, 1, 2.

ENDORSEMENT.

See PROMISSORY NOTES, 1, 2.

ENLISTED MEN.

See BOUNTY, 1-3.

ENTRY.

See BURGLARY, 1.

EQUITY PLEADING AND PRACTICE.

1. Where the defendants in a chancery cause have elected under the statute to have the case tried in open court, the circuit judge has no power at chambers to order the proofs to be taken before a commissioner.—*Eslow v. Albion*, 4.
2. Under a bill to quiet title, where the answer relies upon an adverse right depending entirely upon the location of the description, the proof of possession is not required to be as strict as when there is a defense distinctly set up and relied upon.—*Verplank v. Hall*, 79.
3. A circuit court cannot decline to hear a cause in chancery, where either party has regularly claimed a hearing in open court, unless an order has been made upon good cause shown, directing it to be proceeded in otherwise. Such a case may be placed on the docket, and a *mandamus* lies to compel the court to proceed in it as right and justice may require.—*Stebbins v. Judge of Barry Circuit*, 170.

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4. A bill should contain allegations of facts and not mere recitals of circumstantial evidence, and should show the theory on which complainant intends to rely. But where a bill making out a strong case of fraud was dismissed as improperly framed for specific performance, the decree below was so modified as to make such dismissal without prejudice.—*Wilson v. Eggleston*, *257*.
5. Where a bill to set aside a deed of property given in exchange for other property in another state, charges that the defendants had no title to the lands given in exchange therefor, and that the deed in question was procured by false and fraudulent representations that they had a perfect title thereto, and waives an answer under oath, and the answer without oath does not deny that defendants had no title, nor allege title, but relies upon the defense that no representations of title were made, and the whole course of the proceedings has been upon the assumption or implied admission of want of title, the decree of the court below in favor of complainants will not be reversed for a failure to introduce evidence of the negative fact of want of title.—*Shook v. Proctor*, *349*.
6. The effect and bearing upon the question of the burden of proof, of omissions and implied admissions in answers in chancery, considered.—*Ibid.*
7. This case is held to be within the principle of *Shook v. Proctor*, *supra p. 349*, upon the question of the burden of proof of want of title under a bill to set aside a deed of lands procured in exchange for other lands upon false and fraudulent representations of title to the lands received in exchange, notwithstanding the answer in this case is less open than that in the other to the implication of an admission of want of title.—*Shook v. Proctor*, *377*.

See BILL IN EQUITY, 1-6: FRAUD, 1, 2: MORTGAGES, 4, 7: RESTRAINT OF TRADE, 5: RIPARIAN RIGHTS, 1-4: PRACTICE IN CIRCUIT COURTS, 24, 25: PRACTICE IN SUPREME COURT, 5-8.

ERROR.

See PRACTICE IN CIRCUIT COURTS, 9: REMEDY, 1.

ERRORS CURED.

See SEDUCTION, 6.

ERRORS THAT DO NOT PREJUDICE.

See CHARGE TO THE JURY, 6: DAMAGES, 2: PRACTICE IN SUPREME COURT, 9, 11, 15.

ESCROW.

See DELIVERY, 1-3.

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ESTIMATES.

See MANDAMUS, 1-3.

ESTOPPEL.

In a suit by a vendor against his vendee to compel payment of the balance on a purchase of land, where the dispute related to the price agreed to be paid, the vendor claiming that it was $3,500, subject to a mortgage of $2,500, and the vendee that it was $3,500 in all, it appearing clearly that the vendor's understanding of the contract was as he asserts, and by a preponderance of evidence that the vendee either so understood it also, or at least that, knowing how the vendor understood the negotiations, he failed to suggest any mistake, it was held that the vendee was estopped from asserting a different contract from that which he had left the vendor to understand was mutually intended.—*Manley v. Saunders*, 347.

See CORPORATIONS, 1: FIXTURES, 2: HIGHWAYS, 3: MORTGAGES, 1: PRACTICE IN CIRCUIT COURTS, 21.

EVIDENCE.

1. In an action upon a contract to take and keep a yoke of oxen until a specified time, and to return them at the expiration of the term in as good condition as they then were, without charge for keeping, and to pay for any damages they should sustain, evidence that defendant would not have taken the oxen if he had known their condition as to being well broken, and that one of them had drank lye the previous spring, in the absence of any showing that he had been deceived or defrauded, is inadmissible.—*Smith v. McGill*, 142.
2. In such action it is not error to exclude testimony of defendant's servant as to how other oxen that were treated the same, stood the treatment, where it appears from his own testimony that these oxen were beaten by him in a way and under circumstances that would have justified a criminal prosecution.—*Ibid.*
3. Instructions to the jury based on the assumption that the injury to the cattle may have occurred from exposure after their return, were uncalled for, in the absence of any showing that the exposure was unusual, or that the injuries were of a nature likely to be caused by it.—*Ibid.*
4. Under such a contract the defendant's responsibility for injuries is absolute and not dependent on the failure to employ due care and diligence; and in the absence of any evidence of fraud he cannot discharge himself from liability for any injury actually received by the cattle while in his hands, on any claim that they were less serviceable to him than he expected they would be, or that they had been injured before he took them.—*Ibid.*

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5. Where a witness is sought to be impeached by proof of general reputation, it must be reputation for veracity; and repute as to honesty is not admissible.—*Leonard v. Pope*, *145*.
6. The value of logs at one place cannot be proved by the opinion of a witness having no knowledge of values there, and showing no facts from which it could be got at as compared with values elsewhere. Knowledge of one market justifies no presumption of knowledge of others.—*Greeley v. Stilson*, *153*.
7. Parol evidence of the contents of a United States patent is not admissible.—*Platt v. Haner*, *167*.
8. Judgment will not be reversed because hearsay evidence that is not irrelevant has been admitted without objection at the time; by allowing such evidence to be introduced without objection a party treats it as competent, and is thereby precluded from raising the question on error.—*Hadden v. Shortridge*, *212*.
9. In an action to recover rent, receipts for rent for certain months preceding those for which recovery is sought, standing by themselves and unconnected with the case by any other evidence, are irrelevant.—*Campau v. Traub*, *215*.
10. Evidence on cross-examination of the plaintiff, that he did not know that defendant had obligated himself to fill the ward, and that defendant did not tell plaintiff so, but that defendant had made such a statement in the newspapers in his own defense, is not sufficient proof, standing alone, of the existence of such a contract, to authorize the defendant to rely upon it as a defense.—*Roberts v. Field*, *337*.
11. On the subject of value of land, it is not competent to show generally what a neighbor was offered for adjoining lands; such evidence would be mere hearsay.—*Perkins v. People*, *386*.
12. Where the facts are brought out by distinct and reliable proofs, the theoretical statements of experts as to the scientific possibility of such facts are of little account. Facts cannot be destroyed by theories.—*Treat v. Bates*, *390*.
13. The evidence in this case tended to prove a consideration for the note sued upon, and to support the facts found.—CAMPBELL, J., dissenting.—*Compton v. Blair*, *397*.
14. The minutes of an attorney in a cause, taken on the trial, when properly identified and their correctness proved, may be read in evidence to show, for the purpose of impeaching certain witnesses on a second trial, what they had testified to on a former trial.—*Fisher v. Kyle*, *454*.
15. A permanent bodily infirmity, caused or aggravated by an assault and battery, is properly provable under a declaration averring sickness and pain to have been caused by the assault, and needs no other or fuller averment. It cannot be regarded as foreign to those averments.—*Johnson v. McKee*, *471*.

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16. Statements of a suffering person concerning present feelings and sufferings, and not relations of past sufferings, are admissible in evidence. Such physical conditions as are not open to the sight or senses of others, cannot well be proved in any other way.—*Hyatt v. Adams, 16 Mich., 200*, referred to and followed.—*Ibid.*

17. Where a physician, called by the plaintiff for the single purpose of describing his wound, which he had dressed, and who had been busy on the part of the defense, had been allowed, on cross-examination, to give full testimony concerning the physical and mental condition of plaintiff during his illness, was asked further, on cross-examination, the question: "What appeared to be the condition of his mind as to clearness and sprightliness during the time you attended him?" it was held its rejection was not an abuse of discretion.—*Ibid.*

18. Proof of a subsequent desire to settle is not relevant upon the question of original liability, and does not disprove malice at the time of the assault.—*Ibid.*

19. It will not be assumed as a legal presumption that where the family name and initials are the same, there is identity of person; and therefore Henry V. Libhart is not entitled to recover in an action upon a judgment in favor of H. V. Libhart, without any proof of his identity with the plaintiff in such judgment, and in the absence of any averment in his declaration that he was known by the latter name, or that the judgment was rendered in his favor by that name.—*Bennett v. Libhart, 489.*

20. The fact that the judgment was received in evidence by consent, does not preclude the defendant from raising this point; for proof of the judgment was only one of the steps necessary to make out a case, and should have been followed up by proof of identity of parties.—*Ibid.*

21. The fact that a prisoner on trial for a criminal offense gave no evidence on his examination before the magistrate, cannot be shown on his trial as evidence of his guilt, or as ground of an inference or presumption against his innocence; otherwise all benefit of the privilege which the statute expressly gives the prisoner, of electing to make or not to make defense on his examination, would in effect be taken away from him.—*Templeton v. People, 501.*

22. Upon the trial for an attempt to murder by poison, evidence of a prior criminal intimacy between the prisoner and the wife of the subject of the alleged attempt, and that she was sought to be used by the prisoner as an instrument in the attempt, is competent as showing the relations between them, and as bearing upon the means and opportunity to commit the offense, as well as the motive.—*People v. Jenness, 5 Mich., 323*, cited and approved.—*Ibid.*

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See BILL OF EXCEPTIONS: BOUNTY, 4: BREACH OF PROMISE TO MARRY, 1-3: CHARGE TO THE JURY, 4: CITY COUNSELOR, 3: DAMAGES, 1: DECLARATION, 6-8: EQUITY PLEADING AND PRACTICE, 5-7: FORGERY, 1-3: FRAUD, 4: INSURANCE, 5: MALICIOUS PROSECUTION, 6: MANDAMUS, 2: MECHANIC'S LIENS, 3: MORTGAGES, 5-7: OFFICE, 4-9: PARTNERSHIP, 1, 3: POSSESSION OF LAND, 4, 5, 8: PRACTICE IN CIRCUIT COURTS, 5, 14, 15: PRACTICE IN SUPREME COURT, 13: PROMISSORY NOTES, 5-9: QUO WARRANTO, 2: REMEDY, 2: REPLEVIN, 3, 4: SEDUCTION, 1-7: SLANDER, 1, 2: STIPULATION: TROVER, 3, 4, 7: WILLS, 1-5: WITNESS.

EXAMINATION.

See CRIMINAL PROCEEDINGS, 4: EVIDENCE, 21.

EXCEPTIONS.

See CHATTEL MORTGAGES, 1: PRACTICE IN SUPREME COURT, 12.

EXECUTION.

See ATTORNEY AND CLIENT, 1-3: OFFICER: REPLEVIN, 7: SHERIFF.

EXECUTION SALES.

See MORTGAGES, 13.

EXECUTOR.

See WILLS, 1.

EXPERTS.

See EVIDENCE, 12.

FALSE IMPRISONMENT.

Whether in an action for false imprisonment, where the proceedings for the arrest complained of were in fact criminal in character, but were treated by both parties as civil, the court would be justified in holding the plaintiff to the same rules as if they were civil proceedings:—*Quære?—Pardee v. Smith*, 33.

See DECLARATION, 5: PRACTICE IN SUPREME COURT, 1.

FALSE REPRESENTATIONS.

See PROMISSORY NOTES, 1, 2.

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FAMILY NAME.

See EVIDENCE, 19, 20.

FELONY.

See CARELESS USE OF FIRE-ARMS, 3.

FILLING VACANCIES.

See OFFICE, 2.

FINDING OF FACTS.

See CHATTEL MORTGAGES, 2: PRACTICE IN SUPREME COURT, 13.

FINE.

See CRIMINAL PROCEEDINGS, 1–4.

FIXTURES.

1. A bar, bar fixtures, cupboard, bowling-alley ways and racks, attached by a tenant to a building occupied by him as a saloon under a lease, held to be permanent fixtures, so annexed to the freehold as to belong to it and become the property of the landlord, and not to be removable by the tenant's vendees.—*O'Brien v. Kusterer*, 289.
2. The tenant's sale of these fixtures as personalty and the taking back of a chattel mortgage upon them as such, could not by itself invest him with any new right as against his landlord, or affect the right of the landlord derived from the previous annexation of them to the freehold, in the absence of any showing that the latter in some way waived or relinquished his rights, or assented to the tenant's dealing with them as things removable.—*Ibid.*

FLOATAGE OF LOGS.

See BILL IN EQUITY, 4: WATER-CRAFT ACT, 2–4.

FORECLOSURE.

See FRAUD, 4: HOMESTEAD, 2, 3: MORTGAGES, 4–7, 10–12, 15–17: PRACTICE IN CIRCUIT COURTS, 23–25.

FOREIGN COURTS.

Proceedings by a Canadian court under the Canadian Insolvent act, had against a person while he was in this state, cannot, by mere force or operation of the orders and decrees therein made, and in the absence of any transfer by the insolvent himself, vest the

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Canadian assignee with title to promissory notes in this state which have never been within the territorial jurisdiction of the Canadian court or subjected by any process to its control; and the fact that the insolvent afterwards went to Canada and submitted himself to the jurisdiction of that court, would not help the matter.— *Wood v. Parsons*, *159*.

FOREIGN LAWS.

See FOREIGN COURTS, 1.

FORFEITURE.

See STIPULATED DAMAGES, 1.

FORGERY.

1. On a trial upon the charge of the forgery by raising it in amount, of a mortgage given on a purchase of land, and of uttering the same as genuine, evidence that the prisoner produced in a chancery cause relating to this mortgage, a quit-claim deed (which he had proposed to give on the sale of the lands, but which had been rejected by the purchaser, and one with covenants substituted for it) and testified relative to a pen used to write it, and endeavored to account on a comparison of the deed with the mortgage for some suspicious appearances in the writing as to the consideration and sum to be paid by the mortgage, is not so far foreign to the issue at bar as to preclude the prosecution, who have put it in, from showing that, instead of the facts being as the prisoner had explained, the draft of the quit-claim deed had been altered also, as to the consideration, so as to make it correspond with the altered mortgage; such evidence of the falsity of the explanation is both pertinent and material.—*Perkins v. People*, *386*.
2. In such a case it is also competent for the prosecution to show that the sum mentioned as consideration in the mortgage in question, as well as that expressed in the condition, had been altered.—*Ibid.*
3. The putting of a forged mortgage on record is a sufficient uttering. Collecting money upon it and endorsing the payments is also a sufficient uttering, whether the instrument itself was produced at the time of payment or not.—*Ibid.*

FRAUD.

1. One who, while holding out inducements to another whose estate is largely encumbered, that he will furnish means for him to redeem, and thereby prevents him from looking elsewhere, in the meantime purchases such encumbrances himself and cuts off the redemption, is guilty of fraud, and will not be allowed to enforce

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his advantage.—*Laing v. McKee, 13 Mich., 124*, followed and approved.—*Wilson v. Eggleston, 257.*

2. A bill will not lie in such case to enforce specifically the giving of a loan as proposed, where there was no complete agreement. The remedy is by way of redemption.—*Ibid.*
3. Fraud cannot be presumed without proof.—*Robert v. Morrin, 306.*
4. In this case, which was a bill to foreclose as a mortgage, a deed and bond claimed to have been given by way of security for an indebtedness, and to which the defense was set up that the deed was obtained by fraud, and that the bond produced was a different one from that which the parties actually executed, it was held that the evidence did not sustain this defense.—*Hosley v. Holmes, 416.*

See EQUITY PLEADING AND PRACTICE, 4, 5, 7: FRAUDULENT SALES, 1, 2: PROMISSORY NOTES, 1, 2.

FRAUDULENT SALES.

1. One who has received goods of B, under a conditional arrangement to buy them of him, but who is not a creditor of A, or the representative of a creditor, is not in a situation to attack a prior sale of said goods by A to B, as fraudulent against A's creditors.—*McAuliffe v. Farmer, 76.*
2. In an action of trover, brought by B against C, for the conversion of goods which B had bought of A, and then sold to C on condition that payment should be made on delivery, it is no defense that C has been garnished by A's creditors, whether the sale from A to B was voidable at the instance of A's creditors or not; B's title could not be divested or in any way affected by these garnishee proceedings to which he was not a party.—*Ibid.*

FREEHOLD.

See FIXTURES, 1, 2: LANDLORD AND TENANT, 1: PRACTICE IN CIRCUIT COURTS, 15.

GARNISHEE PROCEEDINGS.

See FRAUDULENT SALES, 2: JUSTICE OF THE PEACE, 1.

GENERAL ISSUE.

See PRACTICE IN CIRCUIT COURTS, 15.

GOOD FAITH.

See PROMISSORY NOTES, 7.

GRADING.

See MANDAMUS, 1-3.

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GRANTEES.

See POSSESSION OF LAND, 3–6.

GRANTORS.

See POSSESSION OF LAND, 2.

GUARDIAN AND WARD.

A person who has been under guardianship is bound by notice of the various proceedings and files in the court of probate relating to his estate, and to the transactions of his guardians as manifested in such proceedings; such a person cannot claim that any fact concerning the guardianship accounts has been concealed from him, which he would have known if he had looked in the probate office.—*Robert v. Morrin, 306.*

HABEAS CORPUS.

A writ of *habeas corpus* will not be granted to review a final judgment in an ordinary criminal cause, for errors which are properly reviewable by writ of error, and where that writ is an adequate remedy.—*Matter of Mary Eaton, 1.*

See CERTIORARI, 4.

HEARING IN OPEN COURT.

See EQUITY PLEADING AND PRACTICE, 8.

HEARSAY.

See EVIDENCE, 8, 11.

HIGHWAYS.

1. Under the statute (*Comp. L. 1857, § 1079*) providing that "all roads not recorded, which have been used as public highways twenty years, or more, and all roads not recorded, which shall hereafter be used ten years or more, shall be deemed public highways," etc., the question of dedication is not involved; the right of the owner to dispute the public user is barred, so far as the prospective provisions of the statute are concerned, after the prescribed period of uninterrupted and undisturbed user, whatever the actual intention of the owner may have been.—*Ellsworth v. Grand Rapids, 250.*
2. The mere making and recording of a plat upon paper by the owner of the land, ignoring the existence of a road in actual use, is not such an interference with the public user of such road as to affect the limitation prescribed by the statute.—*Ibid.*

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3. The fact that the public taxing officers have assessed taxes upon lots according to a plat so covering a road in actual use as that the lots lie partly within and partly without the space covered by the road, does not estop the public or cut off their right to the use of the road; and especially not where such taxes do not appear to have been assessed prior to the expiration of the statute period making the public right absolute.—*Ibid.*
4. Where the proceedings to lay out a highway do not show any proof of service or posting of the notice required by the statute, except the certificate of the commissioners that they have laid out the highway, which recites that they had "given notice according to law," the action of the commissioners is without jurisdiction and void.—*Van Auken v. Highway Commissioners, 414.*
5. The record of proceedings to lay out a highway, required by the statute to be kept by the town clerk, which contains no proof of service or posting of the statutory notice, is defective; and such defect is jurisdictional.—*Ibid.*

HOLDING OVER.

See POSSESSION OF LAND, 1-10.

HOMESTEAD.

1. It is no defense to a bill by a married woman to have a homestead right set off to her, that her husband at the time of the filing of the bill was providing her a comfortable home.—*Comstock v. Comstock, 97.*
2. Where the homestead right is absolutely denied, and its actual enjoyment seriously endangered by the foreclosure of what are claimed to be purchase-price mortgages, the bill filed by the wife cannot be said to be premature because no execution had been levied on the premises and no sale advertised under any decree; the right is one which, from its nature and incidents, may well appeal to preventive remedies.—*Ibid.*
3. Where it appears that the defendants to such a bill are seeking to foreclose a mortgage on the premises claimed as a homestead, which is signed by the husband alone, by suits to which the wife is not made a party, on the ground that it is a purchase-price mortgage, it is no defense to the relief sought, that the husband is still entitled to redeem from the foreclosure, and is not alleged to be unable to do so, and that no fraud is alleged.—*Ibid.*
4. The right of a married woman to sue in such cases is by the statute (*Comp. L. 1871, § 4805*) placed upon the same basis as her right to prosecute in relation to her sole property.—*Ibid.*

See RIPARIAN RIGHTS, 3, 4.

HONESTY.

See EVIDENCE, 5.

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HUSBAND AND WIFE.

See HOMESTEAD, 1–4: TROVER, 9, 10.

IDENTITY.

Of person: See EVIDENCE, 19, 20.
Of suits: See PRACTICE IN CIRCUIT COURTS, 19–22.

IGNORANCE OF THE LAW.

Every one is usually bound as if he had a knowledge of the law, whether he has it or not; but there is no rule which conclusively presumes such knowledge as a fact, where that fact is important. Cases referred to expounding the maxim, *Ignorantia legis non excusat.—Black v. Ward, 191.*

ILLEGALITY.

See CONTRACTS, 1–5.

IMPEACHMENT.

See EVIDENCE, 5.

IMPEDIMENTS TO NAVIGATION.

See WATER-CRAFT ACT, 2–4.

IMPLIED ADMISSIONS.

See EQUITY PLEADING AND PRACTICE, 5–7.

IMPLIED AUTHORITY.

See ATTORNEY AND CLIENT, 1–3.

IMPRISONMENT.

Of females: See PROHIBITORY LIQUOR LAW, 1–3.
See CERTIORARI, 4: CRIMINAL PROCEEDINGS, 3, 4: PRACTICE IN SUPREME COURT, 1: REPLEVIN, 7.

INCOMPETENCY.

See EVIDENCE, 9.

INCONTINENCE.

See BREACH OF PROMISE TO MARRY, 2.

INFERENCES.

See CHARGE TO THE JURY, 2.

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INFORMATIONS.

The objection to a count in an information charging an attempt to murder by poison, that it does not set forth the special circumstances of the attempt, is untenable.—*Templeton v. People*, 501.

INITIAL POINT.

See DEEDS, 1.

INITIALS.

See EVIDENCE, 19, 20.

INJUNCTION.

See RESTRAINT OF TRADE, 4, 5.

INJUNCTION BILL.

See BILL IN EQUITY, 1–6.

INJURED FEELINGS.

See DAMAGES, 2.

INSPECTION.

See LIENS, 2: SALES, 4.

INSTALMENTS.

See MORTGAGES, 14–17.

INSURANCE.

1. A policy of insurance, referring to an application and making it a part of the policy and a warranty by the assured, which provides that "false representations by the assured of the condition, situation, or occupancy of the property, or any omissions to make known any fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in the written application or otherwise, shall render the policy void," is construed to make warranties of the representations and statements referred to, whether material to the risk or not; and materiality to the risk is held to be a limitation attached only to the omission to state facts.—*American Ins. Co. v. Gilbert*, 429.
2. It appeared in this case, by the plaintiff's own showing, that there was a clear over-valuation, known at the time to be so, of the property insured; and also a known violation of the by-laws of the company (which were made a part of the policy), such as to amount to a clear breach of the warranty, and to render the policy void.—*Ibid.*

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3. The circumstances under which the application is claimed in this case to have been made out, with the assistance and according to the suggestions of an agent of the company, were held not to be such as to make the statement of value the act of the company by such agent, instead of that of the insured.—*Ibid.*
4. An applicant for insurance cannot escape responsibility for the statement of facts which he inserts himself in the application, or permits an agent of the insurer to insert as his, upon which he is just as well informed as the agent himself, such as the condition, situation and value of his own property to be insured, by showing that he was induced by such agent, knowingly and against his own judgment, to state them falsely.—*Ibid.*
5. The evidence in this case did not warrant any charge to the jury upon the hypothesis that "the plaintiff was induced by the agent of the company to sign the application for insurance, under the honest belief that it was right" in respect to the statement of values.—*Ibid.*
6. The form of the policy in this case was such as to notify one accepting it that he was himself responsible for the statement of values, by whomsoever made, in the application.—*Ibid.*
7. Under such a policy, the question of over-valuation in the application is not one to be submitted to the jury as a question of fraud or good faith simply; but the statement of value is to be treated as a warranty, of which any substantial over-estimate is a breach, whatever the intent.—*Ibid.*
8. The omission to state, in the application, a small mortgage upon the property, which by the terms of plaintiff's contract of purchase his vendor was bound to pay, and which was less than the amount unpaid on said contract, was one not material to the risk, and therefore, under the terms of the policy, unimportant.—*Ibid.*

INTENT.

See INSURANCE, 7: SALES, 1, 2: WILLS, 6.

INTEREST.

See PROMISSORY NOTES, 7.

INTOXICATING LIQUORS.

See PROHIBITORY LIQUOR LAW, 1-5.

JUDGE'S NOTES.

See QUO WARRANTO, 4.

JUDGE'S OPINION.

See PRACTICE IN CIRCUIT COURTS, 13

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JUDGMENT.

A judgment entry on default (with a proper reference to the court to assess the damages), which first recites the default, and then proceeds, "and the damages of the said plaintiffs having been assessed at the sum of," etc., and thereupon awards judgment in the usual form, is not open to objection upon the ground that it does not show that the damages were assessed by the court.—*Howard v. Tomlinson, 168.*

See CRIMINAL PROCEEDINGS, 1–3: HABEAS CORPUS: JUSTICE OF THE PEACE, 1–8: POSSESSION OF LAND, 10: PRACTICE IN SUPREME COURT, 1, 10, 11, 17: SLANDER, 2: TROVER, 10.

JUDICIAL ACTION.

See JUSTICE OF THE PEACE, 6.

JURISDICTION.

1. The complaint in question in this case, to enforce a penalty for keeping billiard tables under the statute (*Comp. L.*, § *1998*), though not full, direct and precise in its statement of facts, or technically accurate, is held sufficient to give jurisdiction, and therefore not open to objection when attacked collaterally.—*Pardee v. Smith, 33.*
2. An allegation in such complaint that the respondent "has incurred a penalty by the violation" of the statute (naming it by page and section) and that the billiard table was kept in his house, and was resorted to for play with his knowledge and consent, is a statement, by implication, and in argumentative form, that the table was kept in a house "by him actually used or occupied;" and is not open to objection for want of jurisdiction on this ground, in a collateral proceeding.—*Ibid.*
3. In the case of a *capias* in a civil suit, irregularities or errors, however serious, if not jurisdictional, cannot be attacked collaterally; and such irregularities and errors may be waived by a failure to take advantage of them in time, so as not to be open to objection even in a direct proceeding to review the judgment.—*Ibid.*

See CRIMINAL PROCEEDINGS, 3: EQUITY PLEADING AND PRACTICE, 1: FOREIGN COURTS: HIGHWAYS, 4: JUSTICE OF THE PEACE, 2–4, 8. MECHANIC'S LIENS, 1.

JURY.

See PRACTICE IN CIRCUIT COURTS, 11–13.

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JUSTICE OF THE PEACE.

1. A justice of the peace before whom a judgment has been obtained and to whom the same has been paid pending garnishee proceedings before him to reach the avails thereof, may, upon judgment being rendered, in such garnishee proceedings, against the judgment debtor and after the time for appealing therefrom has expired, apply the money so paid into court in payment of such garnishee judgment.—*Griffin v. Potter*, *166*.

2. Under our statute (*Comp. L. 1871*, § *5380*) a judgment of a justice of the peace, in a cause tried by him without a jury, rendered and entered in his docket on the fifth day after the trial, is void, even though the fourth day be Sunday; and is not the subject of a general appeal.—CAMPBELL, J., dissenting.—*Harrison v. Sager*, *476*.

3. This statute having been adopted from the statutes of New York, is held to have been so adopted with the construction put upon it by the courts of that state, which is in accordance with the rule above stated.—*Ibid.*

4. The return of the justice to the appeal setting forth that the cause was tried by him without a jury on the 12th, and that he rendered judgment on the 17th, it will not be presumed in support of the judgment, in the absence of any thing showing that to be the fact, that the cause was not finally submitted to him until the 13th.—*Ibid.*

5. A justice's judgment which was rendered and entered by the justice upon his minutes is not void because it was not forthwith transcribed upon his docket.—*Hickey v. Hinsdale*, *8 Mich.*, *267*, cited and approved.—*Saunders v. Tioga Manufacturing Co.*, *520*.

6. A justice of the peace acts judicially in determining the amount of costs to be taxed in favor of the prevailing party in a suit tried before him.—*Ibid.*

7. After judgment on a verdict for damages, a justice has authority to proceed, on the same day at least, to ascertain and determine the costs, and if necessary, with consent of the parties at least, may hold the case open a reasonable time for that purpose. The costs in such case, when ascertained, being an incident to the principal judgment, the determination of their amount relates back and takes effect as of the time of rendition of the judgment.—*Ibid.*

8. While jurisdiction in the first instance, of a justice of the peace, must be shown and will not be presumed, yet, after jurisdiction of the cause and of the parties is once shown, and the question is whether it had afterwards been lost, it will be presumed, in support of his judgment, that he acted regularly, and that his proceedings were valid, unless the contrary appears.—*Ibid.*

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See ATTORNEY AND CLIENT, 2: COSTS, 1: CRIMINAL PROCEEDINGS, 1–4: OFFICER: PRACTICE IN CIRCUIT COURTS, 5, 14, 16–18: PRACTICE IN SUPREME COURT, 1: REPLEVIN, 7. SHERIFF.

JUSTIFICATION.

See CHARGE TO THE JURY, 6.

KEEPING BILLIARD TABLES.

See CRIMINAL PROCEEDINGS, 1–4: JURISDICTION, 1, 2.

KNOWLEDGE OF THE LAW.

See IGNORANCE OF THE LAW.

LAND BOARD.

See PLAN OF DETROIT, 1, 2.

LANDLORD AND TENANT.

1. In an action upon a covenant in a lease to keep the premises in repair during the term, and at the end thereof to deliver them up in like condition as when taken, reasonable use and wear thereof and injury by the elements excepted, it is not error to charge the jury that the defendant had no right to remove a box-stall he had put up in the barn on the leased premises, if the removal would injure the freehold.—*Murray v. Moross*, *203*.
2. A stipulation in a lease "that all goods, wares and merchandise, household furniture, fixtures or other property, which are or shall be placed in or on said premises by the lessee, shall be liable, and this lease shall hereby constitute a lien or mortgage on said property, to secure the rent due or to grow due on this lease," with authority to the lessor, on default of payment of rent, or upon breach of any of the covenants of the lease, to enter the premises and take the property and sell the same as in cases of chattel mortgages, etc., and retain the amount of any rent due or to grow due on the lease, together with the costs of sale, etc., is not a mortgage, and conveys no present interest in the property.—*Dalton v. Laudahn*, *529*.
3. Under such a clause the right to take the property on account of rent could be exercised only on default in the payment of rent; and therefore a taking on the day the rent fell due could not be justified, as the tenant had the whole day in which to make payment.—*Ibid.*
4. In an action of trover by the tenant for property embraced in such a clause and seized by the landlord on pay-day, the plaintiff's damages cannot be limited to the value of the detention for

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one day, upon a claim that by reason of his having failed to pay the rent the seizure would have been lawful the next day, and would have authorized the detention of the goods for not only the rent then due, but also that to grow due, which was more than the value of the property.—*Ibid.*

See DECLARATION, 8: FIXTURES, 1, 2: POSSESSION OF LAND, 7–10.

LANSING.

See MANDAMUS, 1–3.

LEASE.

See LANDLORD AND TENANT, 2–4: TROVER, 14.

LEGISLATIVE ACTION.

See PLAN OF DETROIT, 1–3.

LEGISLATURE.

See CONSTITUTIONAL LAW, 1, 2: MANDAMUS, 2: PROHIBITORY LIQUOR LAW, 4.

LEWDNESS.

See SEDUCTION, 2.

LICENSES.

1. A parol license to cut timber for a fixed price for stumpage is not invalid, and is not covered by the statute of frauds, either as a sale of an interest in lands, or as a sale of chattels; and the licensee is protected by it in regard to all trees cut before revocation.—*Greeley v. Stilson, 153.*
2. It is error to leave it to a jury to determine whether such a transaction is a license or sale. It can be nothing but a license.—*Ibid.*

LIENS.

1. The contract in this case for manufacturing lumber from logs was held to give a lien for the saw bill, notwithstanding the provision for the payment of the bill for sawing "as often as once a month after the lumber is delivered out of said mill."—CAMPBELL, J., dissenting.—*Chadwick v. Broadwell, 6.*
2. This lien was not lost by the removal of the lumber from the mill yard, some five miles, to a dock at the place of shipment; the provision of the contract that the quantity sawed should be determined by the sales or inspection bills at the place of shipment, is not inconsistent with the continuance of such lien; and such

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inchoate and conditional possession as might be taken by the purchaser as inspection proceeded would not cut off the lien.—*Ibid.*

3. Parties who, in contracting for the sale of logs, have provided for the manufacture of the logs into lumber by their vendee, and thus permitted him to create a lien thereon for the sawing, in dealing with his assignees afterwards in respect to the lumber without any inquiries as to such lien, cannot claim the rights of *bona fide* purchasers through a mere formal transfer by word of mouth simply, and in consideration of a pre-existing debt for the purchase price of the logs.—*Ibid.*

4. Where the defendants in a replevin suit have established a lien for sawing, upon a quantity of lumber of which that replevied was only a portion, a ruling which permits the assessment of their damages at such a portion of their whole lien as the lumber replevied bore to the whole amount subject to the lien, is not one of which the plaintiffs can complain; such apportionment is even more liberal to the plaintiffs than the law requires.—*Ibid.*

See CHATTEL MORTGAGES, 1–3: MORTGAGES, 1–7: TAXES, 1, 2.

LIMITATIONS.

See DECLARATION, 2: HIGHWAYS, 1–3: SEDUCTION, 4: STATUTE OF LIMITATIONS, 1.

LIQUIDATED DAMAGES.

See STIPULATED DAMAGES, 1.

LIQUORS.

See PROHIBITORY LIQUOR LAW, 1–5.

LOBBYING.

See CONTRACTS, 1–5.

LOGS.

See EVIDENCE, 6: LIENS, 1–4: TROVER, 6, 7.

LOTS.

See OFFICE, 1–3.

LOWEST RESPONSIBLE BIDDER.

See CONTRACTS, 8.

LUMBER.

See LIENS, 1–4: SALES, 4.

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MALICE.

See CARELESS USE OF FIRE-ARMS, 1, 2: EVIDENCE, 18: MALICIOUS PROSECUTION, 6.

MALICIOUS PROSECUTION.

1. An action will lie for malicious prosecution where a person has been arrested on a criminal charge, and discharged on a *nolle prosequi*, after efforts to procure a trial. It is not necessary that he should have been tried and acquitted.—*Stanton v. Hart*, 539.
2. The action lies whenever the proceeding has come to an end by a discharge, whatever may be the form of its termination. Any other rule would enable all the mischief to be done without remedy.—*Ibid.*
3. Where the declaration averred that the plaintiff had been "*acquitted and discharged*," but showed such further facts as indicated that there had been a discontinuance, and not a trial and acquittal, it was held no variance to prove such discontinuance. The terms are to be understood according to their context, and the meaning was plainly to be drawn from the whole count.—*Ibid.*
4. The law presumes that members of the bar have more knowledge of law than laymen, and an honest reliance on their advice will justify a prosecution.—*Ibid.*
5. But it does not presume that a layman who is a pettifogger knows more law than other laymen, and his advice will not justify.—*Ibid.*
6. Where a party before procuring an arrest uses every means in his power to inform himself, and acts honestly, such conduct will have its weight in disproving malice.—*Ibid.*

See DECLARATION, 5.

MANDAMUS.

1. Where a contract was made for grading, whereon the contractor was to be paid ninety per cent. on the engineer's estimates as the work progressed (the remainder being payable on completion and acceptance), and received orders drawing interest accordingly, payable only out of a specific fund, and the assessment made therefor was invalid:—

   Held, That a new assessment must be made, and that the charter of Lansing contained provision therefor, which could be enforced by *mandamus*.—*Whitely v. Common Council of Lansing*, 131.
2. Whether the original estimate was conclusive or not, it was not competent for the legislature to enact a statute which should compel the contractor to be bound by a new estimate made without his assent, or to accept less money than he had actually earned. Such new estimate could in no way prejudice his rights, and would not be admissible in evidence for any purpose against him.—*Ibid.*

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3. An issue was granted to ascertain the amount of the work done, leaving the question of the conclusiveness of the first estimate to be determined on final hearing.—*Ibid.*
4. *Mandamus* is the proper remedy where an appeal has been improperly dismissed for defects in the bond and affidavit.—*Detroit & Birmingham Plank Road Co. v. Judge of Wayne Circuit, 503.*

See BOUNTY BONDS: EQUITY PLEADING AND PRACTICE, 3.

MANUFACTURERS.

See LIENS, 1-4.

MARKET VALUE.

See DAMAGES, 1: EVIDENCE, 6:

MARRIAGE.

See BREACH OF PROMISE TO MARRY, 3: SLANDER, 1.

MARRIED WOMEN.

See HOMESTEAD, 1-4: SLANDER, 1.

MASTER AND SERVANT.

One who employs another to fill his ice-house by the cord, and obtains license from the municipal authorities to incumber the street for that purpose, cannot shield himself from liability for injuries caused by unlawfully obstructing the street with blocks and fragments of the ice, under an objection that his employe was a contractor and alone liable. *Detroit v. Corey, 9 Mich., 165*, cited and held to be decisive of the question.—*Darmstaetter v. Moynahan, 188.*

MATERIALITY TO THE RISK.

See INSURANCE, 1-8.

MATTER EX POST FACTO.

See EVIDENCE, 18.

MEANDERED LAKE.

See DEEDS, 1.

MEASUREMENT.

See SALES, 2-4.

MEASURE OF DAMAGES.

See DAMAGES: LIENS, 4.

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MECHANIC'S LIENS.

1. In proceedings under the statute (*Comp. L. 1871, ch. 215*), to enforce a mechanic's lien upon real property, it is essential that every substantial requisite and every fact essential to jurisdiction should appear upon the record. It is essential to the creation of any lien under § 6789 of the statute, that the contract be made with the owner, part owner or lessee of the land; and a petition to enforce an alleged lien under that section which fails to allege that the respondent was either owner, part owner or lessee of the land upon which the lien is sought to be enforced, or to set out that he had any interest therein whatever, is fatally defective; and this defect would not be cured by an admission in the answer that the respondent was the owner of the land described in the petition; and especially not where this admission is coupled with an express denial that the work charged for by the petition was done or agreed to be done on that land.—*Clark v. Raymond, 456.*
2. Whether dredging out a slip for a wharf and throwing the excavated dirt within the line of the proposed wharf and scraping the same back and leveling it off, is such work as could be made the subject of a lien under the statute:—*Quære?—Ibid.*
3. When the alleged contract under which the work is claimed to have been done is an oral one, and its terms are disputed, the lien will not be sustained unless the evidence of the petitioner is clear and decisive as to the real nature and terms of the actual contract, and so far preponderates as to satisfy the court without much hesitation of the correctness of his allegations; and the evidence in this case was not of that character.—*Ibid.*

MENTAL ANXIETY.

See DAMAGES, 2.

MENTAL CAPACITY.

See WILLS, 1–6.

MERGER.

See CITY COUNSELOR, 2.

MILL OWNERS.

See BILL IN EQUITY, 1–6.

MISDEMEANOR.

See CARELESS USE OF FIRE-ARMS, 3.

MISJOINDER.

See BILL IN EQUITY, 1.

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MISREPRESENTATIONS.

See FRAUD, 1.

MISTAKE.

See ESTOPPEL.

MITIGATION.

Of damages: See BREACH OF PROMISE TO MARRY, 2: TROVER, 5.

MONEY.

See PROMISSORY NOTES, 3.

MONEY HAD AND RECEIVED.

See DECLARATION, 6: REMEDY, 2.

MONEY PAID TO USE OF DEFENDANT.

See DECLARATION, 9: SURETIES, 2.

MORTGAGES.

1. Where a mortgagee, after having assigned the mortgage to his father, has dealt with the mortgagor and his grantees on the basis that he still held the mortgage, and the father has failed to give notice of the assignment and has so conducted himself as to authorize them to believe that the son was the real owner of the mortgage, the father is estopped from denying the right or authority of the son, whether the money for which the mortgage was originally given was his or not.—*McCabe v. Farnsworth*, 52.
2. The mortgagor and his grantees having deeded the mortgaged premises and other property to the mortgagee and others, in consideration of the mortgage debt and other debts, and taken back a contract to reconvey on certain conditions specified, the mortgage debt was held to be thereby satisfied and extinguished.—*Ibid.*
3. The mortgage debt having been thus paid and extinguished, it could only be revived as a lien on the property, by either a mutual rescission of the deed and contract, which would imply a reconveyance, so as to put all parties in *statu quo*, or a new subsequent agreement founded upon a new and sufficient consideration; and an abandonment of the contract merely could not have that effect.—*Ibid.*
4. And if the mortgage debt were thus revived by a new and subsequent agreement, the obligation to pay and the lien would rest, not upon the old mortgage and note, but upon such new agree-

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ment, which would alone constitute the basis of the right to enforce payment or to foreclose.—*Ibid.*

5. In any suit, therefore, either to enforce payment or to foreclose the lien, such new agreement, being the foundation of the right of action, must be pleaded; and evidence of such an agreement would not be competent under a foreclosure bill setting up and relying upon the original note and mortgage only.—*Ibid.*
6. Defendants to a foreclosure bill, by allowing the bill to be taken as confessed, admit nothing more than the case made by the bill, and not any new agreement relied upon, which appears in the proof only; and a defense made by those who answered, showing affirmatively the extinguishment of the mortgage constituting the only ground of relief set up in the bill, enures equally to the benefit of all the defendants.—*Ibid.*
7. Evidence of subsequent dealings between the mortgagee and those to whom, jointly with him, the mortgagor had conveyed the mortgaged premises in satisfaction of the mortgage debt, in reference to reviving the lien, is held incompetent under the bill in this case.—*Ibid.*
8. The allowance made by the court below for the value of the use of a horse and buggy under a stipulation secured by mortgage made by a son to his parents, to furnish the same as required, will not be disturbed, except upon clear and satisfactory showing that it is unreasonable.—*Tucker v. Tucker*, 204.
9. The arrangement must be presumed to have been made in view of the existing relations of the parties, and subject to such conditions as might naturally arise in their daily business and exigencies, and could not be properly so construed as to require obedience to the caprices or unreasonable demands of the mortgagee.—*Ibid.*
10. A subsequent mortgagee may redeem a prior mortgage which has been foreclosed by advertisement under the statute.—*Carter v. Lewis*, 241.
11. While the register of deeds has no authority under the statute to receive any thing but money in redemption of a foreclosed mortgage, yet when one desiring to redeem goes to the register prepared to pay the money, and offers to pay it, and the register, knowing the amount, but being too busy to count the money, requests him to place the money in a bank and give a check for the amount, and he does so, and the register, after the expiration of the time for redemption, receives for the check a certificate of deposit in his own name for the amount, it cannot be said that this is not such a payment of the money to the register as operates under the statute to redeem the mortgage.—*Ibid.*
12. A mortgagee who files a bill of foreclosure is not bound to bring in parties interested in the equity of redemption, unless where he has actual or constructive notice of their claims, and where

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he has no such notice they are barred by the foreclosure.—*Woods v. Love, 308.*

13. A sheriff's certificate of an execution sale is not constructive notice to prior mortgagees, though regularly filed in the register's office; and an execution purchaser cannot, by reason of the filing of such certificate, be authorized to attack a foreclosure in chancery to which he was not made a defendant.—*Ibid.*

14. Where several distinct payments are secured by one mortgage, no one of them has any preference over the rest in consequence of its falling due sooner, but all have equal claims to be paid ratably out of the land.—*McCurdy v. Clark, 445.*

15. Under our statute (*Comp. L.*, § *6913*), a mortgage payable in instalments stands upon the same basis as to foreclosure, as if each instalment were secured by a separate and independent mortgage, neither having priority over any others; and a foreclosure under the power of sale, for an instalment simply, is entirely unsuited to the enforcement of the respective liens, or the adjustment of the respective interests.—*Ibid.*

16. Such a sale, expressly made subject to the subsequent instalments, will leave such instalments a lien on the land as against both the mortgagor and the purchaser at the sale.—*Ibid.*

17. Such a sale, not made subject to the subsequent instalments, will bar only the equity of redemption of the mortgagor and subsequent purchasers and incumbrancers, and will not cut off the other instalments; and a subsequent foreclosure for another instalment would do nothing towards an adjustment of the respective interests of the parties; if each bid off the whole land, neither would become owner of any particular part thereof, or of any definite undivided interest therein, but each would still have a lien, which, though foreclosed as to those holding subordinate rights, would remain, as to the other, a mere lien; neither could redeem from the other, and neither would gain or lose precedence or position by the foreclosure sale.—*Ibid.*

See CHATTEL MORTGAGES, 1–3: FORGERY, 1–3: HOMESTEAD, 2, 3: LANDLORD AND TENANT, 2; PRACTICE IN CIRCUIT COURTS, 23–25: PRACTICE IN SUPREME COURT, 6: RENTS AND PROFITS.

MOTION.

To dismiss: See PRACTICE IN CIRCUIT COURTS, 18.

MOTIVE.

See EVIDENCE, 22.

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW, 2.

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NAMES.

See EVIDENCE, 19, 20.

NATURAL FLOW.

See RIPARIAN RIGHTS, 1–4.

NAVIGABLE WATERS.

See BILL IN EQUITY, 4: WATER-CRAFT ACT, 2–4.

NEW AGREEMENT.

See MORTGAGES, 3–7.

NEW ARRANGEMENT.

See NOVATION.

NEW ASSESSMENTS.

See MANDAMUS, 1–3.

NEW TRIAL.

See PRACTICE IN SUPREME COURT, 10.

NOLLE PROSEQUI.

See MALICIOUS PROSECUTION, 1: PRACTICE IN SUPREME COURT, 18.

NOMINAL PAYEE.

See PAYMENT, 1.

NON JOINDER.

See BILL IN EQUITY, 1: PARTNERSHIP, 4.

NON-SUIT.

See TROVER, 10.

NOTICE.

Attached to plea: See DECLARATION, 4: PRACTICE IN CIRCUIT COURTS, 14, 15.
Of appeal: See PRACTICE IN SUPREME COURT, 8.
To quit: See POSSESSION OF LAND, 7–10.
See BONA FIDE PURCHASER: GUARDIAN AND WARD: HIGHWAYS, 4, 5: INSURANCE, 6: MORTGAGES, 1, 12, 13: OFFICER: POSSESSION OF LAND, 2, 6: PROMISSORY NOTES, 2.

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NOTICING FOR HEARING.

See PRACTICE IN SUPREME COURT, 2.

NOTICING FOR TRIAL.

See PRACTICE IN CIRCUIT COURTS, 6, 7.

NOVATION.

Where, by an arrangement between three, the debt of one to another has been transferred to the third, it is competent for them to make a new arrangement to transfer the debt back to the original debtor; and this may be done as well by an actual and understood abandonment of the first novation as by an explicit second novation; and a note thereafter given by the original debtor on account of such debt, cannot be said to have been without consideration.—*Compton v. Blair*, 397.

NUISANCE.

See RIPARIAN RIGHTS, 3, 4: WATER-CRAFT ACT, 2, 3.

OFFENSES.

See CRIMINAL PROCEEDINGS, 3.

OFFERS.

See EVIDENCE, 11.

OFFER TO DELIVER.

See TROVER, 4.

OFFICE.

1. A trial by lot under the statute (*Comp. L. 1871*, § *136*) providing for drawing lots for office in case it appears from the legal canvass of votes that two or more persons have received an equal number of votes, and that a failure to elect is caused thereby, does not preclude the inquiry by the attorney general, on the relation of the losing party in the drawing, into the legality of the votes counted by the board of canvassers for the respondent.—*Keeler v. Robertson*, 116.
2. This statute cannot be construed as a regulation under the power granted to the legislature by the constitution (*Art. III.*, § *37*), to declare and fill vacancies; it applies to cases where no vacancy in fact exists; and the power given is subject to an express qualification excluding its exercise in cases where the constitution makes provision for filling vacancies; and such provision is made (*Const., Art. X.*, § *3*) in the case of registers of deeds.—*Ibid.*

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3. The terms of the statute, when fairly considered, do not manifest an intent that the result reached by the board of canvassers, when followed by a formal drawing, shall be conclusive upon the candidates and the public; and the effect to be given to a certificate granted under this statute is no greater than that which is given to a certificate of election in other cases.—CAMPBELL, J., dissenting.—*Ibid.*

4. The ultimate determination of a right to an elective county office is by the ballots themselves. But the law makes certain official counts and returns presumptive evidence of the number of votes cast, and such official counts will prevail, if lawfully and regularly made, until overthrown by count of the ballots.—*Ibid.*

5. But an official count not legally made is void, and can neither be received in evidence, nor made the ground of an official certificate or return.—*Ibid.*

6. The only official count of ballots permitted by the election laws must be made publicly and the result announced publicly when the statements have been examined and the count completed, immediately after the closing of the polls. This result is the only one which can lawfully be certified, and the ballots must be sealed up as soon as the count is closed and the result determined and published. It is unlawful thereafter to open the ballot-box, except under the direction of the court upon a trial, and any other opening or count based thereon will be illegal for all purposes.—*Ibid.*

7. The public declaration of the count is an official act and will prevail over any statement or certificate founded upon a subsequent and unlawful recounting.—*Ibid.*

8. Where a slip is pasted over a name so as to partially obliterate it, the slip should be counted.—*Ibid.*

9. Where a contest arises upon an election, the most satisfactory evidence should be produced, and the course taken in this case, of not resorting to the ballots, was commented on.—*Ibid.*

See QUO WARRANTO, 1–5.

OFFICER.

An officer does not render himself liable in trespass for proceeding in good faith to serve a justice's execution after he has been told by the defendant that an appeal has been taken, where the justice insisted that the appeal had not been perfected; he has a right to rely upon his process until he is officially notified of its having been superseded.—*Foster v. Wiley*, 244.

See SHERIFF, 1.

OFFICIAL BOND.

See CITY COUNSELOR, 1, 2.

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OFFICIAL COUNT.

See OFFICE, 4–9.

OFFICIAL DUTIES.

See ATTORNEY AND CLIENT, 4: CITY COUNSELOR, 1, 2.

OFFICIAL RETURNS.

See OFFICE, 4–9.

OFFSET.

See COSTS, 2: POSSESSION OF LAND, 8–10.

OMISSIONS.

See INSURANCE, 1, 8: EQUITY PLEADING AND PRACTICE, 6, 7.

OPINION.

See EVIDENCE, 6.

OPINION OF THE JUDGE.

On questions of fact: See PRACTICE IN CIRCUIT COURTS, 13.

OUTSTANDING TITLE.

See REPLEVIN, 1–3.

OVER-VALUATION.

See INSURANCE, 2–8.

OXEN.

See EVIDENCE, 1–4.

PARAMOUNT RIGHTS.

See BILL IN EQUITY, 5.

PARENTS.

See STREET RAILWAYS, 3–5.

PARKS.

See PLAN OF DETROIT, 1–6.

PARTIES.

See BILL IN EQUITY, 1: EVIDENCE, 19, 20: MORTGAGES, 12, 13: PARTNERSHIP, 1-4: PRACTICE IN SUPREME COURT, 5–8.

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PARTNERSHIP.

1. The unity of interests in plaintiffs who claim as partners, is not necessarily to be shown by direct proof; it may be established by circumstances; and where the circumstances shown have some tendency to prove the fact, and the question has been properly left on the evidence to the jury, their verdict will not be disturbed on error upon the ground of the insufficiency of the evidence.—*Hadden v. Shortridge, 212.*
2. A contract of sale by one partner to another of his share and interest in the store and business, together with the goods and all accounts and demands due the firm, which provided for the payment by the purchaser, of all debts of the firm, and of the purchase price, one-quarter down and the balance on time, secured by a lien on "said goods," etc., is construed to contemplate the holding of the entire goods, and not simply the proportion thereof so sold, as security for the performance of the terms of the purchase.—*Northrup v. McGill, 234.*
3. Partners are presumed, in the absence of any showing of their respective interests, to be equal partners.—*Ibid.*
4. The representatives of a deceased partner, before the partnership business has been settled and the debts paid, and while they have not yet been let into joint possession by the surviving partner, have but an equitable interest in the partnership property, and are not tenants in common at law; and the right of action at law for any trespass upon, or injury to, the property during this interval is vested solely in the surviving partner; and a demurrer to a declaration by the surviving partner upon such a cause of action, for non-joinder of such representatives, is not well taken.—*Pfeffer v. Steiner, 537.*

PASSENGERS.

See STREET RAILWAYS, 1–5.

PATENT.

See EVIDENCE, 7.

PAY-DAY.

See LANDLORD AND TENANT, 3, 4.

PAYEE.

See PAYMENT, 1.

PAYMENT.

Where the nominal payee to whom a subscription is payable, is bound absolutely to pay it over to a third person, a payment by

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the subscriber directly to such third person is valid, and will discharge him from further liability.—*Erwin v. Lapham*, 311.

Into court: See JUSTICE OF THE PEACE, 1.

Under legal process: See VOLUNTARY PAYMENT.

See LIENS, 1: MORTGAGES, 2–4, 11: PROMISSORY NOTES, 6, 7.

PENALTY.

See PROHIBITORY LIQUOR LAW, 1.

PENDENCY OF SUIT.

See PRACTICE IN CIRCUIT COURTS, 19–25.

PERSONAL ACTION.

See PRACTICE IN CIRCUIT COURTS, 20.

PERSONALTY.

See FIXTURES, 1, 2: SALES, 1–4.

PETITION.

For clemency: See PROMISSORY NOTES, 8.

See MECHANIC'S LIENS, 1.

PETTIFOGGERS.

See MALICIOUS PROSECUTION, 4–6.

PHYSICAL SYMPTOMS.

See CHARGE TO THE JURY, 2.

PIANO.

See REPLEVIN, 5.

PLAINTIFFS.

See PARTNERSHIP.

PLAN OF DETROIT.

1. The interior open spaces in the original plan of the city of Detroit were, by the acts of the governor and judges and the early legislation of the territory, set apart to such uses as the city council of Detroit, in its legislative capacity, might "at any time" provide. The land board had no further power or control in the matter, and their subsequent attempt to confine the dedication was void.—*Riggs v. Board of Education of Detroit*, 262.

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2. The acts of the council as a land board under the acts of congress were under a different authority from their legislative acts under the state or territorial laws, and they could not be legally identical.—*Ibid.*
3. The control of the uses of these lands was vested in the council as a legislature, and was to be exercised from time to time, and the uses were variable. It was not competent for one council to prevent legislative action by a future council, to change a former use.—*Ibid.*
4. The city of Detroit has power to vacate any of its open spaces or parks at its discretion, when deemed a necessary public improvement, and of this the council is to judge for itself.—*Ibid.*
5. The use of a triangle in the old city plan, for a public library, is within the original purposes of the dedication, as well as within the power of the city, under its authority to vacate open spaces for public improvements.—*Ibid.*
6. History of the plan of Detroit referred to.—*Ibid.*

PLATTING LANDS.

See HIGHWAYS, 2.

PLEA.

See DECLARATION, 4: PRACTICE IN CIRCUIT COURTS, 14, 15.

PLEADINGS.

See DECLARATION, 1–8: MECHANIC'S LIENS, 1: MORTGAGES, 4–7: PRACTICE IN CIRCUIT COURTS, 3, 4, 14, 15: QUO WARRANTO, 4.

POLICY.

See INSURANCE, 1–8.

POSSESSION.

See EQUITY PLEADING AND PRACTICE, 2: LIENS, 2: RENTS AND PROFITS: REPLEVIN, 1–3, 5, 6: TRESPASS, 1: TROVER, 9–13.

POSSESSION OF LAND.

1. In summary proceedings under the statute (*Comp. L. 1871*, § *6706–25*) for the possession of land, a complaint which sets out that the respondent is in possession of the premises, describing them, and contains the usual allegations of the common printed form, but with the blanks for the names left unfilled, and concludes that the respondent "*therefore* holds said premises unlawfully and against the right of this complainant, and that this

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complainant is entitled to the possession of the same," etc., is sufficient; the printed portion, with the unfilled blanks, being treated as if erased, and the word, "therefore," rejected as surplusage.—*Bennett v. Robinson*, *26*.

2. The continued possession of a grantor long after the recording of his deed to another, may raise a presumption that, as between himself and his grantee, he has either retained, or since acquired some right to the land or its possession. This case and *Bloomer v. Henderson*, *8 Mich.*, *395*, distinguished.—*Ibid.*
3. The right of possession transferred to the grantee by a deed absolute on its face is not defeated by a subsequent contract to reconvey in the future upon certain conditions, which is silent upon the subject of possession; and the grantor holding over becomes tenant, either by sufferance or at will, of his grantee.—*Ibid.*
4. Adverse titles cannot be tried in the summary proceedings provided by statute to recover possession of lands; but deeds of conveyance may nevertheless become competent evidence in such proceedings.—*Ibid.*
5. An objection to a deed offered in evidence in such proceedings, that it does not tend to show any privity between the parties, is not tenable; privity between the parties is not required to be shown, and in cases of tenancy by sufferance, at any rate, does not exist.—*Ibid.*
6. In this case the question whether the tenancy was one at will or by sufferance merely, became immaterial, since both are required to be terminated by the same notice.—*Ibid.*
7. The notice to pay rent or surrender possession, required by the statute (*Comp. L. 1871*, § *6706*) providing for summary proceedings to recover the possession of land, may be served by delivery on the premises, to a member of the tenant's family, of suitable age and discretion, with the request to deliver the same to such tenant.—*McSloy v. Ryan*, *110*.
8. In proceedings under this statute evidence of the landlord's breach of covenants to repair and make improvements, which are independent of the covenant to pay rent, is irrelevant; this proceeding is not one in which, even if the amount of the rent due be in issue, there can be any deduction of offsets, or by way of recoupment.—*Ibid.*
9. The issue involved in these proceedings embraces the questions both of rent overdue and of a proper written demand of payment or possession; and the rent overdue is that due when the demand is made; and any subsequent case that is tried on a new demand is for a cause that originates with that demand, and is a different cause from any prior one based upon a former demand; and a verdict and judgment in the tenant's favor on such prior cause is not conclusive on the question of rent over-

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due, in the absence of any showing that such verdict was based upon a conclusion that no rent was due, notwithstanding the new demand was made before any additional rent had fallen due after the former trial.—*Ibid.*

10. Upon the trial in these cases in the circuit, on appeal, it is not requisite that there should be a finding of the amount of rent due; the provisions of the statute (*Comp. L. 1871*, § *6710*), requiring this finding, as well as those providing (§ *6719*) "that no writ of restitution shall issue if the defendant shall, within five days after final judgment, pay the amount so found due" and double costs, do not apply to the trial on appeal; the appeal is allowed only from the "determination or judgment" of the commissioner, and the finding of the amount due, though to be stated in the judgment, is in fact no part of it.—*Ibid.*

POSSESSORY RIGHT.

See PRACTICE IN CIRCUIT COURTS, 15.

PRACTICE IN CIRCUIT COURTS.

1. It is not error for the court, in a cause tried without a jury, to "refuse to permit a defendant to inquire into the consideration" of the note sued upon "and to contest the note in respect to the consideration thereof," where the evidence is direct and clear and uncontradicted, that the plaintiff is a *bona fide* purchaser.—*Polhemus v. Ann Arbor Savings Bank*, *44*.
2. Whether a decision of this character, made on a trial by the court without a jury, would be reversed where the evidence was conflicting:—*Quære?*—*Ibid.*
3. A defendant who has failed to file an affidavit denying the genuineness of the note set out in the declaration is precluded by circuit court rule 79 from showing that the note, as described and as produced in evidence, was not as he executed it, and a ruling to that effect is not error.—*Ibid.*
4. The court has power in its discretion to allow a defendant to amend his plea by putting in an affidavit denying the execution of the note declared upon.—*Ibid.*
5. On *certiorari* to review a judgment of a justice of the peace, the circuit court cannot weigh the evidence; and it is error in such a case, where the testimony was conflicting, to allow a reduction by way of recoupment rejected by the justice upon the facts and without refusing to receive any evidence.—*Overpack v. Ruggles*, *65*.
6. A rule of the circuit in reference to dismissing appeals from justice's courts, which provides for a dismissal on motion where the cause has not been duly noticed for trial for some term not later than the fourth term after the entry of the cause in the circuit, does not apply to a case which has once been duly noticed within the

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time prescribed, notwithstanding there has subsequently been a delay without noticing for the time prescribed.—*Willis v. Gimbert, 91.*

7. Whether the power to adopt such rules is vested in the supreme court, to the exclusion of the circuit courts, so as to render such a rule adopted by the circuit court nugatory:—*Quære?—Ibid.*
8. The circuit courts have authority under the statute (*Comp. L. 1871, § 5455*) to dismiss an appeal for want of prosecution, only where there is a delay to prosecute within such time as shall be prescribed by the general rules of the court; and in the absence of any such rule they have no general authority to dismiss at discretion.—*Ibid.*
9. A motion to change *venue* is discretionary and not subject to review on error.—*Greeley v. Stilson, 153.*
10. It is competent for the circuit court to make a special rule shortening the time limited for making defaults absolute to two days in term.—*Howard v. Tomlinson, 168.*
11. The jury cannot be required to find specially upon any question the answer to which would in no way affect a general verdict.—*Sheahan v. Barry, 217.*
12. The act providing a stenographer for Wayne county (*Comp. L. 1871, § 5034*) is valid, and controls sections one and four of the former act (*Comp. L. 1871, §§ 5023, 5026*) concerning the charging of juries. The circuit judge of Wayne county has the same power as before the earlier act was passed, to charge fully and orally.—*Ibid.*
13. It is not error which will require the reversal of a judgment, that a circuit judge indicates his views as to the credibility or a witness, if he expressly directs the jury to decide for themselves without reference to his views.—*Ibid.*
14. Where an action of trespass, commenced before a justice of the peace, has been certified to the circuit under the statute (*Comp. L. 1871, § 5330*), for the reason that it appeared from plaintiff's evidence that a question of title to land was involved, the fact that the defendant had failed to give notice with his plea, that title would come in question, does not, on the trial in the circuit, operate as an admission of the plaintiff's title, so as to exclude evidence of title in defendant; the case stands in the circuit subject to the same rules of proof and disproof as though it had been originally commenced there.—*Rawson v. Finlay, 268.*
15. Our statutory general issue, like the plea of not guilty, is a denial of all the material allegations in the declaration, and is sufficient to enable the defendant to contest all such allegations and to put the plaintiff upon the proof of all or any of them; and under it a freehold or mere possessory right in the defendant may be given in evidence.—*Ibid.*

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16. Under our statutes (*Comp. L. 1871*, §§ *5451*, *5453*) an appeal from a justice of the peace cannot be dismissed absolutely, for defects and informalities in the affidavit and bond for appeal, where the appellant tenders a new and proper affidavit and bond.—*Detroit & Birmingham Plank Road Co. v. Judge of Wayne Circuit*, *303*.

17. On an appeal taken by a corporation a bond executed by two individual obligors is sufficient, if otherwise in regular form, although one of the obligors is named in the bond as principal instead of surety.—*Ibid.*

18. The proper practice on a motion to dismiss an appeal for such defects, is to make an order *nisi* that the appeal be dismissed unless within a time specified a new and correct affidavit and bond be filed.—*Ibid.*

19. Proceedings in one court should not be stayed on account of a suit pending in another, unless they are identical.—*Granger v. Judge of Wayne Circuit*, *406*.

20. A personal action at law in a state court will not be stayed on account of a proceeding *in rem* in admiralty.—*Ibid.*

21. The right to have a common-law liability enforced by common-law proceedings is one of which a person cannot lawfully be deprived, unless where he has done something which raises an equity by way of estoppel.—*Ibid.*

22. Cases cited and questions discussed as to the practice where more than one suit is pending covering the same grounds in whole or in part.—*Ibid.*

23. The pendency of a foreclosure suit in equity is not pleadable in abatement to a suit at law on the debt.—*Joslin v. Millspaugh*, *517*.

24. The statute (*Comp. L.*, § *5149*) which prohibits legal proceedings pending such a foreclosure, without leave of the court, leaves the question of permitting such proceedings to be determined in equity by the court where the foreclosure is pending, and not at law. That court will compel an election of remedies, or permit the double action, in its sound discretion.—*Ibid.*

25. The effect of this statute is to put foreclosure suits on the same footing with other suits in equity, where an election of remedies is enforced, subject to discretion. The courts of equity having now power to grant a personal decree for the debt, a resort to law is needless for that purpose, and there is no reason for making the exception which formerly existed in foreclosure suits in favor of exemption from election between law and equity.—*Ibid.*

See ATTACHMENT, 1–6: CARELESS USE OF FIRE-ARMS, 8: COSTS, 2: DECLARATION, 1–4: EQUITY PLEADING AND PRACTICE, 1–3: JUDGMENT, 1: JUSTICE OF THE PEACE, 8: LICENSES, 2: PRACTICE IN SUPREME COURT, 4: REPLEVIN, 4: RESTRAINT OF TRADE, 5: STIPULATION: TROVER, 2: WILLS, 8: WITNESS.

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PRACTICE IN SUPREME COURT.

Where a justice's judgment in a suit against a justice of the peace for false imprisonment by the issuing of a warrant against the plaintiff, is brought to the circuit by *certiorari* and there affirmed, only such objections to the validity of the proceedings for the imprisonment, will be considered on error to review the determination of the circuit, as were passed upon in the court below.—*Pardee v. Smith*, *33*.

2. The fact that the bill of exceptions has been removed from the files for amendment by order of the court, and that the amendments are not completed nor the bill of exceptions returned, does not prevent noticing the case for hearing.—*Polhemus v. Ann Arbor Savings Bank*, *44*.
3. Assignments of error must be specific. *Altman v Wheeler*, *18 Mich.*, *240*, cited and approved.—*Ibid.*
4. The refusal of the court to grant a motion for leave to amend a plea by putting in an affidavit denying the execution of the note sued upon will not be reviewed on error, although the ground of the refusal was the mistaken one of a lack of power; a review in an appellate tribunal of such practice questions is objectionable upon grounds of general utility and practical necessity; but farther than that the real subject of complaint is the final result and not the reason which led to it, and a correct ruling will not be reversed because it was based upon a wrong reason.—*Ibid.*
5. Where a party in whose favor decree in the circuit is granted, wishes the decree modified in his favor, he must appeal notwithstanding the other party has appealed.—*McCabe v. Farnsworth*, *52*.
6. A mortgagor against whom a decree in a foreclosure suit has been taken, making him personally liable for any balance, is not precluded from contesting the validity of the decree upon the merits on an appeal, by the fact that he has parted with his title to the mortgaged premises to one who has allowed the decree to be taken by default and failed to appeal.—*Ibid.*
7. Defendants against whom a decree for costs has been taken, may appeal from the decree.—*Ibid.*
8. An appeal in chancery in a case where the evidence has been taken in open court will not be dismissed for the reason that the notices of appeal and of settling a case upon the evidence were served upon the appellee in person instead of his solicitor of record, where he is himself a solicitor of the court and has taken part in the management and trial of the cause and made no objection to the service at the time.—*McCurdy v. Bowman*, *214*.
9. While it is the duty of the party who complains of error to show its existence, it generally devolves upon the other party, on whose motion the error was committed, to show, if he so claims, that the complaining party was not prejudiced by it.—*Campau v. Traub*, *215*.

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10. Where a case has been submitted below upon an agreed state of facts, upon a reversal of the judgment in this court on error, no new trial will be granted.—*Harrington v. Hilliard*, *271*.
11. Where, upon the whole case, it appears that the plaintiff is not entitled to recover, the judgment against him will not be disturbed for errors in the rulings of the trial court.—*Barnum v. Stone*, *332*.
12. Exceptions to the charges to the jury on the weight to be allowed to the prisoner's statement on the trial, will not be considered on a record which does not show that the prisoner made any statement.—*Perkins v. People*, *386*.
13. On writ of error to review upon exceptions to the finding, a judgment based on a finding of facts and conclusion of law on a trial by the court without a jury, the weight or sufficiency of the evidence will not be considered; the only inquiry is whether there was any evidence tending to prove the facts found.—*Compton v. Blair*, *397*.
14. In this case, the decree below having been modified on appeal, each party being held to have been in error from the beginning, no costs were awarded to either party.—*McCurdy v. Clark*, *445*.
15. It is incumbent upon a plaintiff in error, in order to reverse the judgment against him below, to show both that the rulings complained of are erroneous, and that he was prejudiced thereby.—*Richards v. Tozer*, *451*.
16. The fatal defect upon which the decree of the court below was reversed, being one appearing on the face of the petition, and to which the respondent made no objection in the court below, no costs were awarded to either party.—*Clark v. Raymond*, *456*.
17. There being no dispute as to the facts, and the judgment being correct, except in the amount of damages, it is affirmed to the proper amount, with costs of the circuit to plaintiffs below, and reversed as to the excess, with costs of this court to plaintiffs in error.—*Johnston v. Whittemore*, *463*.
18. Where the whole facts proved went to negative the offense charged, and there was nothing tending to sustain it, the certificate sent down in answer to the exceptions directed a *nolle prosequi*.—*People v. Chappell*, *486*.

See CERTIORARI, 1, 2: CHARGE TO THE JURY, 5: EQUITY PLEADING AND PRACTICE, 4, 5: EVIDENCE, 9: HABEAS CORPUS: JUSTICE OF THE PEACE, 8: MANDAMUS, 3, 4: MORTGAGES, 8: PARTNERSHIP, 1: PRACTICE IN CIRCUIT COURTS, 2, 7, 9, 13: QUO WARRANTO, 1–5: REPLEVIN, 6: TROVER, 7: WATER-CRAFT ACT, 3: WITNESS.

PREJUDICE.

See PRACTICE IN SUPREME COURT, 9.

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PRESUMPTIONS.

See BILL OF EXCEPTIONS: CHATTEL MORTGAGES, 2: DELIVERY, 1: EVIDENCE, 6, 19, 20: FRAUD, 3: GUARDIAN AND WARD: IGNORANCE OF THE LAW: JUSTICE OF THE PEACE, 4, 8: PARTNERSHIP, 3: POSSESSION OF LAND, 2: PROMISSORY NOTES, 7: RESTRAINT OF TRADE, 1: SALES, 3, 4: SEDUCTION, 7: WILLS, 5.

PRICE.

See SALES, 2, 3.

PRINCIPAL.

See PRACTICE IN CIRCUIT COURTS, 17.

PRISONER'S STATEMENT.

See PRACTICE IN SUPREME COURT, 12.

PRIVILEGE,

Of witnesses: See SEDUCTION, 3–6.

PRIVITY.

See POSSESSION OF LAND, 5.

PROCESS.

See CERTIORARI, 1: HABEAS CORPUS: OFFICER: SHERIFF.

PROHIBITORY LIQUOR LAW.

1. The action of debt provided for by the prohibitory liquor law (*Comp. L. 1871*, § *2141*) is in the nature of a civil action, and not a criminal prosecution; and the statute (*Comp. L. 1871*, § *6119*) prohibiting the imprisonment of females on "any process in any civil action" applies to a *capias* issued under that section, whether the act for which the penalty is given constitutes a misdemeanor and is punishable as such or not.—*Strickland v. Bartow*, *68*.
2. The statute (*Comp. L. 1871*, § *6119*) prohibiting the imprisonment of females in a civil action is not repealed by section 10 of the prohibitory liquor law (*Comp. L. 1871*, § *2145*); this statute was intended to declare the settled policy of the state in this regard, and all later statutes giving the right generally to commence suits by *capias*, or to imprison a defendant, are to be construed in reference to this policy.—*Ibid.*
3. A circuit court commissioner, therefore, has no authority to make an order to hold a female to bail upon a *capias* issued under the penal section of the prohibitory liquor law (*Comp. L. 1871*, § *2141*). —*Ibid.*

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4. One who had paid moneys for liquors sold to him in violation of the prohibitory liquor law, as it existed before the amendment of 1871, had a right to recover it back as money paid without consideration, and this right of action was a vested one which subsequent changes in the statute could not affect.—*Peters v. Goulden, 171.*
5. The right of recovery under this statute is not limited to the sum paid at any one time.—*Ibid.*

PROMISSORY NOTES.

1. In an action against an endorser upon a promissory note, the fact that the endorsement was procured by means of false and fraudulent representations made by the plaintiff to the endorser, through the procurement of the maker of the note, as to the pecuniary responsibility of the latter, is a good defense; the statute of frauds (*Comp. L. 1871, § 4701*) requiring representations "concerning the character, conduct, credit, ability, trade, or dealings of any other person," to be in writing, etc., has no application to such a case.—*Lenheim v. Fay, 70.*
2. One who has been privy to, and a participant in, the fraudulent procurement of an endorsement has notice of the fraud, and cannot become a *bona fide* purchaser of the paper endorsed, so as to be entitled to recover upon the contract of endorsement.—*Ibid.*
3. A note made and endorsed in Michigan and payable in Canada, "*in Canada currency*," is payable in *money*, and is therefore negotiable; such a phrase in a note made here means no more than that it is payable in Canada money at the Canadian standard, as it would have been without such phrase if made and payable there.—*Black v. Ward, 191.*
4. The use of a superfluous phrase of this kind is too common to indicate or permit any inference that it is to change the natural meaning of the instrument; and this is especially so when such forced construction impairs the validity of a contract.—*Ibid.*
5. In an action by a bank upon promissory notes given by the relatives of one who has robbed the bank, and claimed to have been received in consideration and settlement of the indebtedness of the criminal to the plaintiff growing out of such robbery, it is competent for the defense to show the amount of such indebtedness as bearing upon the consideration of the promise sued upon; and upon this question the defendants are not concluded by the admissions of the criminal upon a settlement with the bank, but may show the facts.—*Buck v. First National Bank of Paw Paw, 293.*
6. Evidence in such an action, of admissions by the criminal that a lot conveyed by his mother in part payment of his indebtedness to the plaintiff prior to the giving of the notes sued upon, was purchased with money belonging to the plaintiff, is irrelevant; the fact that

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the lot was conveyed in reduction of the indebtedness was material, as it operated as a payment to that extent, but what equitable claim the plaintiff had to such conveyance aside from the indebtedness, was immaterial.—*Ibid.*

7. The fact that the defendants at an interview when interest on the notes was arranged but before the principal fell due, made no objection to the payment of the notes, and paid the interest which fell due before the maturity of the principal, would not raise a presumption against the good faith of the defense afterwards set up in this case; the notes being negotiable, it was not inconsistent with an intent to make the defense eventually, that they should keep silent about it until the whole sum fell due, and so conduct themselves as not to excite the alarm of the plaintiff and thus cause him to negotiate the notes.—*Ibid.*

8. A note given to a bank in consideration of assurances on the part of its officers that they would sign a petition to the judge for clemency towards a relative of the makers who is under arrest for robbing the bank, or that they would be more likely to do so, or that in any manner they would exercise, or be more likely to exercise, influence with the court to secure a lighter sentence, is based upon a consideration opposed to public policy, and is consequently void; and this upon the ground of the tendency of such an understanding to encourage deception of the judge, and to mislead him in the facts upon which his judicial action should be based.—*Ibid.*

9. Neither the sympathy of such relatives nor their relationship to the criminal could have any bearing upon the case, since neither of these separately, nor both together, could constitute a legal support to the promise; nor, provided the only inducement to make the promise was the desire to shield their relative, is it material, as between the makers and the bank, that the criminal was indebted to the bank to the amount of the notes given.—*Ibid.*

See EVIDENCE, 13: NOVATION: PRACTICE IN CIRCUIT COURTS, 1–4: STATUTE OF LIMITATIONS, 1.

PROOFS.

See EQUITY PLEADING AND PRACTICE, 2: PRACTICE IN CIRCUIT COURTS, 14.

PROSECUTING ATTORNEY.

See CRIMINAL PROCEEDINGS, 4.

PROVOCATION.

See DAMAGES, 2.

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PUBLICATION.

See WILLS, 7.

PUBLIC IMPROVEMENT.

See PLAN OF DETROIT, 4.

PUBLIC LIBRARY.

See PLAN OF DETROIT, 5.

PUBLIC POLICY.

See CONTRACTS, 1-5: PROMISSORY NOTES, 8: RESTRAINT OF TRADE, 1-5.

QUALITY.

See SALES, 2-4.

QUANTITY.

See SALES, 2, 4.

QUANTUM MERUIT.

See ATTORNEY AND CLIENT, 4: CITY COUNSELOR, 1-3.

QUARRELS.

See WITNESSES.

QUESTIONS OF FACT.

See CHARGE TO THE JURY, 2: PRACTICE IN CIRCUIT COURTS, 13: REPLEVIN, 4: WATER-CRAFT ACT, 3.

QUO WARRANTO.

1. Where an issue under proceedings in the nature of a *quo warranto* has been sent down for trial, the case remains throughout as an original cause in the supreme court, and the verdict and proceedings on the trial, when certified up, will be subject to the same rules as apply in any court when judgment is moved for on a *nisi prius* record.—*Keeler v. Robertson*, *116*.
2. In such proceedings the burden is on the respondent to justify his own title,—that of the relator being a collateral issue; and a judgment of ouster will be rendered against a respondent who shows no title, whether the relator's title prevails or not.—*Ibid.*
3. The whole verdict of a jury must be construed together, and general findings or conclusions inconsistent with special findings will be disregarded as wrong conclusions upon facts found.—*Ibid.*

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4. A verdict must always be read in the light of the pleadings, and when it refers to documents annexed to it, they must be regarded as incorporated in it; and if not annexed, the verdict may be aided by the judge's notes, where they will suffice for that purpose.—*Ibid.*
5. When the right of a respondent is referred by a verdict entirely to the county canvass, and the verdict finds facts which invalidate the returns on which it was founded, the canvass is thereby prevented from being conclusive.—*Ibid.*

See CERTIORARI, 2: OFFICE, 1-9.

RAILROAD AID BONDS.

See CONSTITUTIONAL LAW, 1, 2.

RAILROADS.

See CORPORATIONS, 1.

REAL ESTATE.

See BONA FIDE PURCHASER: EVIDENCE, 11: EQUITY PLEADING AND PRACTICE, 5-7: FIXTURES, 1, 2: TAXES, 1, 2.

REASONABLE CARE.

See TROVER, 2.

RECEIPTS.

See EVIDENCE, 9.

RECOUPMENT.

See POSSESSION OF LAND, 8-10: PRACTICE IN CIRCUIT COURTS, 5.

REDEMPTION.

See FRAUD, 2: MORTGAGES, 10, 11.

REGISTER OF DEEDS.

See OFFICE, 2: MORTGAGES, 11.

RELATION.

See JUSTICE OF THE PEACE, 7.

RELATIONSHIP.

See PROMISSORY NOTES, 9.

RELATOR.

See QUO WARRANTO, 2.

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REMEDY.

1. Error is the proper remedy for reviewing the determination of the circuit in wrongfully dismissing an appeal from a justice's court for want of prosecution.—*Willis v. Gimbert, 91.*

2 Evidence that defendants have come lawfully into the possession of government bonds, as gratuitous bailees for plaintiff's intestate, and have delivered the same over without receiving any thing therefor, to a third person who claimed title thereto, will not support a count by the administratrix for money had and received to her use. The appropriate remedy is either trover, or a special action on the case for violation of duty as agents or bailees.—*Barnum v. Stone, 332.*

See BOUNTY BONDS: CERTIORARI, 1, 2: FRAUD, 2: HABEAS CORPUS: MANDAMUS, 4: PRACTICE IN CIRCUIT COURTS, 21.

REMEDY AT LAW.

See BILL IN EQUITY, 2.

RENT.

See EVIDENCE, 9: LANDLORD AND TENANT, 3, 4.

RENTAL VALUE.

See ACCOUNTING: RENTS AND PROFITS.

RENT DUE.

See POSSESSION OF LAND, 8–10.

RENTS AND PROFITS.

The grantees in possession under a deed absolute in form, but given by way of security merely, do not stand exactly in the same position, in reference to an accounting for the rents and profits, as ordinary mortgagees who have taken possession by way of enforcing their security; they are agents of the grantors as well as mortgagees, and are chargeable for any failure to obtain full rental value for the premises only on the same grounds as an agent thus put in possession.—*Barnard v. Jennison, 230.*

REPAIRS.

See DECLARATION, 8: LANDLORD AND TENANT, 1.

REPETITIONS.

See CHARGE TO THE JURY, 1: SLANDER, 2, 3.

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REPLEVIN.

1. One from whom chattels have been taken by mere trespassers while he was in peaceable possession and holding subject to claims of persons other than the defendants, can maintain replevin.—*Van Baalen v. Dean, 104.*
2. One in the sole and peaceable possession of goods, not as an intruder, trespasser or wrong-doer, but as owner, either of the whole, or some special property in them, has a valid title as against all mere strangers, which they cannot defeat by showing an outstanding title in some third party.—*Ibid.*
3. In an action of replevin parol evidence that at the time the goods were taken from the plaintiff he was served with an attachment against a third person and in favor of the defendants, without any proof of the process or proceedings in attachment, is insufficient to prove that the goods were in the custody of the law when the replevin suit was brought.—*Ibid.*
4. Under the evidence in this case the question whether the plaintiff's brother was part owner with him of the property, was one of fact for the jury, and it was error, therefore, for the court to determine it.—*Ibid.*
5. A contract for the sale of a piano upon condition of the delivery by the purchaser to the vendor in payment therefor of certain tickets of subscription for a newspaper and to a premium drawing, the vendee agreeing to repurchase, at a price specified, all such tickets that remained unsold after a day named, and the vendor to use reasonable exertion to sell the same in the meantime, which provides that the piano "is to remain the property of the vendor and subject to his directions, and not to be moved from place to place without his written assent until all of the conditions herein specified are fulfilled;" and that in case of default in any of the conditions, the vendor "may declare this agreement void and take possession of the piano wherever found, without legal process, and retain payments made, as damages for non-performance," etc., does not give the vendor the right of possession until he has exercised his right to declare the contract of sale terminated; and his tendering the tickets back, and on payment being refused, putting them into the hands of an attorney for collection, could not operate to give him the right of possession.—*Giddey v. Altman, 206.*
6. In an action of replevin by one claiming under the vendees in such contract against vendor's agent, who had taken possession without a previous demand, the judgment below in favor of the plaintiff will not be disturbed because of a ruling that this contract transferred the title to the vendees, in the absence of any showing that the vendor had taken any steps to declare the contract void, whether the ruling be correct or not.—*Ibid.*

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7. Imprisonment of a defendant in replevin, though expressly allowed by statute (*Comp. L.*, § *5393*) on an execution issued upon the judgment of a justice of the peace, is not allowed on an execution in the same action in the circuit; and could therefore be avoided by an appeal.—*Tomlin v. Fisher*, *524*.
See CERTIORARI, 1, 4: LIENS, 4: TROVER, 10.

REPRESENTATIVES OF DECEASED PARTNER.

See PARTNERSHIP, 4.

REPUTATION.

Of executor named: See WILLS, 1.
See EVIDENCE, 5: SEDUCTION, 1: SLANDER, 1.

REQUEST TO BECOME CO-SURETY.

See SURETIES, 3.

RES ADJUDICATA.

See FOREIGN COURTS, 1: POSSESSION OF LAND, 9: SLANDER, 2.

RESERVATION.

In deed: See TROVER, 6, 7.

RES INTER ALIOS.

See FRAUDULENT SALES, 1, 2: REPLEVIN, 3.

RESOLUTIONS.

See BOUNTY, 1–3.

RESPONDEAT SUPERIOR.

See MASTER AND SERVANT.

RESTRAINT OF TRADE.

1. Contracts in restraint of trade, which, considered with reference to the situation, business and object of the parties, and in the light of all the surrounding circumstances, appear to have been made for a just and honest purpose and for the protection of legitimate interests, and are reasonable as between the parties, and not specially injurious to the public, will be upheld; and the weight or effect to be given to the surrounding circumstances is not affected by any presumption for or against the validity of the restriction.—*Hubbard v. Miller*, *15*.

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2. Such contracts, if unobjectionable in other respects, require no greater pecuniary or valuable consideration to support them than any other contract; and if objectionable in other respects no amount of pecuniary consideration will render them valid.—*Ibid.*
3. When one who is engaged in any branch of business purchases the business and stock of another engaged in the same branch of business, on the condition that the vendor shall not further carry on this particular branch of business within a reasonable extent of territory, such restraint of trade, being reasonable and fair between the parties, will be enforced; and the fact that the price paid does not exceed the cost of the goods purchased does not affect the validity of the contract.—*Ibid.*
4. An agreement made in consideration of such a purchase of the business of sinking drive wells and keeping and selling the materials therefor at Grand Haven, that the vendors would not "keep well-driver's tools or fixtures, or engage in the business of well-driving," is construed to impose a restraint upon the carrying on of such business at Grand Haven and within such limits about that city as this business there located would naturally and reasonably embrace, and not such a general and unlimited restraint of trade as to be void; and is sustained as reasonable, and enforced by injunction.—*Ibid.*
5. This sale and agreement having been made by a firm of two persons, one of whom afterwards went into the business alone, and the other as a partner with a third person who is made a defendant, the injunction is limited as to such third person, to prevent him simply from engaging in the business as a partner with either of the other defendants, and not to restrain him individually.—*Ibid.*

RETURN.

See CERTIORARI, 4: JUSTICE OF THE PEACE, 4.

RETURNS.

See OFFICE, 1–9: QUO WARRANTO, 5.

RIDING UPON FRONT PLATFORM.

See STREET RAILWAYS, 1–5.

RIGHT OF POSSESSION.

See REPLEVIN, 5, 6.

RIPARIAN RIGHTS.

1. A riparian owner has the right of drainage into the stream opposite his own lands, of such of his land as requires it, and has

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the right to the natural flow of the stream for that as well as for other purposes.—*Treat v. Bates*, 390.

2. Any dam below, which sets back the water to his injury, is a violation of his rights, and may be made the ground of equitable relief.—*Ibid.*
3. Ownership of a homestead seriously affected by a nuisance injurious to health, is a sufficient special interest to give a right to equitable interference.—*Ibid.*
4. And where the partial abatement of a dam would prevent the overflow of the complainant's land, but its entire abatement was necessary to abate a public nuisance affecting his homestead, a decree for such complete abatement was affirmed.—*Ibid.*

See BILL IN EQUITY, 1–6: WATER-CRAFT ACT, 2–4.

RULES.

See PRACTICE IN CIRCUIT COURTS, 6–8.

SALARY.

See ATTORNEY AND CLIENT, 4: CITY COUNSELOR, 1–3.

SALES.

1. The question whether a sale is completed, or only executory, where no question arises under the statute of frauds, and the rights of creditors do not intervene, is one to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold, and the circumstances surrounding the sale.—*Lingham v. Eggleston*, 324.
2. Where the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined; these are circumstances indicating intent, but are not conclusive.—*Ibid.*
3. But where any thing is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of these things, in the absence of any thing indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they may and ought to be accepted.—*Ibid.*
4. In this case, which involved the question of the sale of certain lumber specifically designated, but not actually delivered, under a

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contract making the price to depend upon an inspection and separation of qualities and measurement of quantities to be thereafter made, it was held that something of importance remained to be done by the vendor to ascertain the price to be paid, and that this was, in the absence of any thing showing a contrary intent, presumptively a condition precedent to the transference of title. —*Ibid.*

See ESTOPPEL: FRAUDULENT SALES, 1, 2: LICENSES, 1, 2: MORTGAGES, 15–17: PARTNERSHIP, 2: REPLEVIN, 5, 6: RESTRAINT OF TRADE, 1–5: TROVER, 9.

SANITY.

See WILLS, 5.

SATISFACTION.

See MORTGAGES, 2–4.

SAW BILL.

See LIENS, 1–4.

SCHOOL DISTRICT.

See CERTIORARI, 2.

SECURITY.

See PARTNERSHIP, 2.

SECURITY CLAUSE IN LEASE.

See LANDLORD AND TENANT, 2–4: TROVER, 14.

SECURITY FOR GOOD BEHAVIOR.

See CRIMINAL PROCEEDINGS, 1–4.

SEDUCTION.

1. On a trial for seducing and debauching an unmarried woman, evidence of the reputation of the prosecutrix for morality and virtue at the time of the trial is inadmissible, as her reputation at that time would be injuriously affected by the offense itself when made known.—*People v. Brewer*, *134*.
2. In such a case evidence of the admission by the prosecutrix of sexual intercourse with another person than defendant is not admissible as proof of the substantive fact; nor is it admissible to prove that she was not a pure-minded woman, but was inclined to lewdness, when not offered in connection with other proofs of a habit of lewd talk and conversation, and when no

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proper foundation had been laid for its introduction as impeaching testimony.—*Ibid.*

3. A witness put upon the stand in such a case and asked whether he had ever had sexual intercourse with the prosecutrix, has a right to decline to answer; and it is not error for the court to refuse to require him to give the reason for declining, as a valid reason is manifest.—*Ibid.*
4. It is not error for the court to refuse to compel a witness in such a case to answer whether he had not had sexual intercourse with the prosecutrix previous to the alleged offense, notwithstanding any prosecution against him for seduction would be barred by the statute of limitations at the time of the trial, in the absence of any showing that he had not already been complained of, and when a prosecution for rape had not yet been barred.—*Ibid.*
5. The granting of a request to charge as to the effect of the refusal of witnesses to answer such questions, that "the case, so far as those questions and answers are concerned, should stand in the minds of the jury as if the questions had not been asked, or the same as if answered in the negative," though erroneous standing by itself, could work no harm in the absence of any evidence of the fact of such intercourse.—*Ibid.*
6. The erroneous impression which this request might have produced, if given alone, is held to have been cured in this case by the clear, full and positive instructions given in the general charge of the court, which laid down the correct rule in this regard.—*Ibid.*
7. It is not error to charge in such a case, that the law presumes a woman to be chaste until the contrary is shown.—*Ibid.*

See BREACH OF PROMISE TO MARRY, 1, 2.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

Of notice of appeal in chancery: See PRACTICE IN SUPREME COURT, 8.

See ATTACHMENT, 1–4: HIGHWAYS, 4, 5: POSSESSION OF LAND, 7.

SERVICES.

See ATTORNEY AND CLIENT, 4: CITY COUNSELOR, 1–3.

SET-OFF.

See COSTS, 2: POSSESSION OF LAND, 8–10.

SHARES.

See PARTNERSHIP, 3.

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SHERIFF.

Under our statute (*Comp. L. 1871, § 563*), expressly empowering sheriffs to serve any process which constables may execute, no special direction for the purpose is necessary; and a deputy sheriff is not liable in trespass on the ground of want of authority to act, for levying a justice's execution addressed to any constable, etc.—*Foster v. Wiley, 244.*

SLANDER.

1. A married woman may bring a sole action for slander, and her marriage may be proved by repute. The highest evidence of marriage is not required, where that fact is not a part of the main issue.—*Leonard v. Pope, 145.*
2. In actions of slander, evidence may be given of repetitions of the same slander, to enhance the damages. Such repetitions constitute practically one slander, aggravated by the enlarged circulation; and a judgment in such a case is a bar against any further action for any such repetition open to proof on the trial.—*Ibid.*
3. Authorities upon this subject discussed.—*Ibid.*

SLIPS.

See OFFICE, 8.

SOLICITORS.

See PRACTICE IN SUPREME COURT, 8.

SPECIAL CONTRACT.

See DECLARATION, 3, 4, 9: TROVER, 9–13.

SPECIAL QUESTIONS.

To be put to jury: See PRACTICE IN CIRCUIT COURTS, 11.

SPECIFIC PERFORMANCE.

See EQUITY PLEADING AND PRACTICE, 4: FRAUD, 1, 2.

STATEMENTS.

Of present sufferings: See EVIDENCE, 16.
Of value: See INSURANCE, 1–3.

STATUTE OF FRAUDS.

See LICENSES, 1: PROMISSORY NOTES, 1.

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STATUTE OF LIMITATIONS.

Under our statute of limitations of personal actions (*Comp. L. 1857, ch. 165*) a cause of action which accrued in Canada upon a promissory note in favor of a Canadian resident who has never been within the United States, is not barred by the defendant's residing more than ten years in this State; the disability of absence from the United States under the statute (§ *5366*) applies to such a case, and prevents the limitation from running.—*Erskine v. Messicar, 84.*

See DECLARATION, 2, 5: SEDUCTION, 4.

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STAYING PROCEEDINGS.

See PRACTICE IN CIRCUIT COURTS, 19–22.

STENOGRAPHER.

See PRACTICE IN CIRCUIT COURTS, 12.

STIPULATED DAMAGES.

1. Where a building contract contains many and various conditions, a breach of some of which would be easily and fully compensated by damages readily proven, and where a breach of others would not necessarily involve more than trifling damages, a provision for the forfeiture of five hundred dollars in case of any failure to perform on either side will not be enforced by way of liquidated damages, though such be the expressed intent.—*Trustees of First Orthodox Congregational Church, etc. v. Walrath, 232.*
2. Former cases on the subject of stipulated damages collected and followed.—*Ibid.*

See TROVER, 12, 13.

STIPULATION.

Under a stipulation that the "testimony" of a witness who was examined and cross-examined on a former trial, as the same was taken down by the official stenographer, might be used in evidence, it is error to exclude the cross-examination, after having admitted the direct, even though at the request of the party who had conducted such cross-examination.—*Campau v. Traub, 215.*

STOCK.

See CORPORATIONS, 11.

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STRANGERS.

See REPLEVIN, 2.

STREET RAILWAYS.

1. It is the duty of a street railway company to provide vehicles which insure security to their passengers, and not to suffer them to occupy unsafe places upon such vehicles.—*East Saginaw City Railway Co. v. Bohn, 503.*
2. If this duty is neglected, and a passenger is injured, he cannot recover damages of the company if his own neglect of the duty of self-preservation contributed to the injury; but duty can only be predicated of one who has capacity to understand and ability to perform it; and therefore a child not of an age or discretion to understand the danger in riding upon the front platform of a street car, cannot be charged with negligence in so doing.—*Ibid.*
3. Parents have a right to assume that street railway companies furnish conveyances which are reasonably safe, and have regulations which preclude persons from riding in unsafe places upon them; and they cannot, therefore, be charged with negligence in permitting their children to ride on the street cars without escort, if the company consent so to receive them.—*Ibid.*
4. While the company would not be liable to a person of suitable age and discretion who, being warned of the danger in riding upon the front platform of the car, should persist in doing so, yet, in case of a child, lacking such discretion, and to whom, consequently, negligence could not be imputed, it would be the duty of the officers of the company not to stop with a warning, but to compel such child to occupy the proper place in the car. —*Ibid.*
5. Where a child four years of age, in company with his brother, twelve and a half years old, took a street car, and both sat down on the front platform with their feet on the step, and there was no other interference with their riding there except that the conductor claims (which, however, is denied) that when he took their fare he told them to go into the car, and the younger boy, in some way unexplained, got off the car while in motion, and was run over, negligence cannot be imputed either to the parents of the children, in permitting them to take the cars alone; or to the younger boy; or to the older boy, without a showing that he had more than the ordinary discretion and judgment of boys of his years, and that he understood the danger and difficulty of protecting both himself and his brother against it; but the company was guilty of negligence in permitting the boys thus to ride, and liable in damages for the injury.—*Ibid.*

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SUBSCRIPTION.

See PAYMENT, 1.

SUBSCRIPTIONS.

To stock: See CORPORATIONS, 1.

SUBSEQUENT DESIRE TO SETTLE.

See EVIDENCE, 18.

SUBSEQUENT MORTGAGE.

See MORTGAGES, 10.

SUMMARY PROCEEDINGS.

See POSSESSION OF LAND, 1–6.

SUNDAY.

Taking a prisoner to jail on Sunday, under legal process, is a work of necessity; and hiring a horse for that purpose is not an illegal contract under the statute.—*Fisher v. Kyle*, 454.
See JUSTICE OF THE PEACE, 2–4.

SUPERIOR COURT OF DETROIT.

Under the act establishing the superior court of Detroit, an application to transfer a cause from the Wayne circuit, made after the act has taken effect and the judge been elected, cannot be denied on the ground that the court has not been fully organized for the reason that the time fixed for holding its first term has not yet arrived.—*Turner v. Judge of Wayne Circuit*, 5.

SURETIES.

1. A surety on a bail bond is entitled to contribution from a co-surety for any payment in excess of his share, unless there is an agreement to the contrary, express or implied.—*McKee v. Campbell*, 497.
2. Where a surety paid his own half, and joined with his co-surety in a note for the other half, and was sued and suffered judgment on the note, and paid the judgment, such note is to be regarded as given for the sole debt of the co-surety, and the money as paid to his use; in such case the necessary costs are recoverable back, as well as the debt, as they were caused by the default of the latter, and paid under legal compulsion.—*Ibid.*

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3. The fact that one becomes co-surety at the request of another surety, raises no obligation against the person so requesting, to save the other harmless; there is a legal liability to contribute equally, unless changed by agreement.—*Ibid.*

See PRACTICE IN CIRCUIT COURTS, 17.

SURPLUSAGE.

See POSSESSION OF LAND, 1: PROMISSORY NOTES, 3, 4.

SURVIVING PARTNER.

See PARTNERSHIP, 4.

SWAMP LAND ROADS.

See CONTRACTS, 1–5.

SYMPATHY.

See CHARGE TO THE JURY, 3: PROMISSORY NOTES, 9.

TAXATION OF COSTS.

See JUSTICE OF THE PEACE, 6, 7.

TAXES.

1. Under our statute, state, county and township taxes upon real estate become a lien upon the land from the first Monday in December of the year in which they are assessed, and not before; and as between vendor and purchaser under a warranty deed, the obligation is upon the vendee to pay the taxes for the current year where the conveyance is prior to that date, and upon the vendor where it is subsequent.—*Harrington v. Hilliard*, 271.
2. The provision of the statute (*Comp. L. 1871*, § *1006*) making the taxes upon real estate a charge against the person owning the same, on the second Monday of May, of the year in which they are assessed, construed in connection with previous statutes *in pari materia* and the general nature of our system of imposing and collecting taxes, and held to have been intended only as a cumulative remedy on behalf of the state, and not to make the taxes a charge upon the person or the land prior to the first Monday in December, when, for the first time, they exist as taxes, and the opportunity is offered, or the duty arises, to pay them. This provision does not affect the question of the obligation to pay the taxes as between vendor and purchaser.—*Ibid.*

See CERTIORARI, 3: HIGHWAYS, 8.

TENANCY.

See LANDLORD AND TENANT, 1–4: POSSESSION OF LAND, 7–10.

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TENANT.

See DECLARATION, 8: FIXTURES, 1, 2: LANDLORD AND TENANT, 1–4: POSSESSION OF LAND, 1–10.

TESTAMENTARY CAPACITY.

See WILLS, 1–6.

TESTIMONY.

See BILL OF EXCEPTIONS: EVIDENCE, 1–22: STIPULATION.

THEORIES.

See EVIDENCE, 12.

TIE.

See OFFICE, 1–3.

TIMBER.

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TIME.

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TITLE.

See CERTIORARI, 1: EQUITY PLEADING AND PRACTICE, 5–7: FOREIGN COURTS, 1: FRAUDULENT SALES, 1, 2: OFFICE, 1–9: PRACTICE IN CIRCUIT COURTS, 14: QUO WARRANTO, 2: REPLEVIN, 1–6: SALES, 1–4.

TOWNSHIPS.

See BOUNTY BONDS.

TRANSFER.

See TROVER, 9.

TRANSITORY ACTIONS.

See TROVER, 1.

TRANSOM WINDOW.

See BURGLARY, 1.

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TRESPASS.

A builder cannot retain possession as against the owner of a building he is constructing under contract with such owner, to enforce payment of the contract price, after the time for performance has expired and he has ceased work, claiming that the building is completed according to the terms of the contract.—*Beller v. Stange*, *312*.

See ATTORNEY AND CLIENT, 1-3: OFFICER: PARTNERSHIP, 4: PRACTICE IN CIRCUIT COURTS, 14.

TRESPASSER.

See REPLEVIN, 1, 2: TROVER, 1.

TROVER.

1. Trover is a transitory action; and an action for the conversion of timber is not made local by being brought against the original trespasser who cut the trees.—*Greeley v. Stilson*, *153*.
2. In an action of trover for the conversion of certain machinery and tools which the defendant leased of the plaintiff and failed to restore at the end of his term, a charge to the jury that a failure on the part of the defendant to keep and care for the goods as a prudent man would of his own would put an end to the relation of bailor and bailee and render him guilty of the conversion and entitle the plaintiff to bring trover without any demand, is too broad where the evidence of want of due care points only to a portion of the property, and as to that, only shows an exposure to possible injury which does not appear to have resulted in fact.—*Thompson v. Moesta*, *182*.
3. In such a case proof that a mortgagee of the property told the plaintiff none of it must be removed until the mortgage was paid or reduced and the plaintiff replied "all right," and that the mortgagee communicated this to the defendant and urged him not to let the property go till the mortgage was reduced, is evidence from which assent of the plaintiff to the retention of the property might have been found; and if he gave such assent he could not hold defendant liable in trover afterwards without first withdrawing the assent and demanding the property.—*Ibid.*
4. In the absence of evidence of any demand and distinct refusal to deliver up the property, in such case, notice to the plaintiff that he must remove the property or defendant would charge him rent, is equivalent to an offer to deliver, and rebuts the presumption of conversion; and the fact that such offer was made, not to plaintiff directly, but to another who communicated it to plaintiff, does not lessen its effect.—CAMPBELL, J., dissenting.—*Ibid.*
5. A defendant in trover cannot show in mitigation of his unlawful taking of the plaintiff's property, his own unauthorized and

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unsanctioned application of the fruits of his tort, upon a naked personal demand of his own against the plaintiff, not in judgment, nor a lien upon the property converted.—*Northrup v. McGill*, *234*.

6. One who bases his right to recover in trover for a quantity of logs, upon an exception and reservation to himself in his conveyance of the land on which the logs were cut, of an undivided one-half of the pine timber with the right to enter and take it away before 1868, cannot recover without proof that the logs were taken away by him before the time limited.—*Richards v. Toser*, *451*.

7. And where in such a case there was no such proof, and the ruling and charge of the circuit judge was equivalent to a direction to find for the defendant upon other grounds, the judgment of the court below will not be reversed on error at the instance of the plaintiff, whether the rulings complained of were correct or not; for, on the whole case it appears that he was not entitled to a verdict in any event, and therefore the rulings to which he excepted did not prejudice him.—*Ibid.*

8. One who hires a horse for a specified journey, and drives it beyond what his contract contemplated, takes upon himself all the consequences of such additional driving, and if the horse dies while being so driven, he is liable in trover for its value.—*Fisher v. Kyle*, *454*.

9. One who, upon separating from his wife, has placed in her possession, and for her separate use, and as her individual property, agreeing to pay the balance due therefor, an organ which he received under an agreement in writing, whereby he undertook to hold it in his possession as the property of another of whom he was to purchase it, the organ in the meantime, and until fully paid for as therein provided, to remain the property and subject to the direction of the vendor, and which he had not yet paid for, thereby makes himself liable in trover to his vendor for the balance due on the contract, on the ground of a wrongful determination by him of the contract of bailment; such transfer to his wife would be as clearly a conversion as if sold to any other person for any consideration he might have agreed upon.—*Johnston v. Whittemore*, *463*.

10. The fact that the plaintiffs in such a suit in trover had before brought replevin against defendant and wife for the organ in question, thereby getting possession thereof, and had suffered judgment for its value upon a non-suit to pass against them in favor of the wife, and had paid that judgment, would not affect the rights of the parties, and would not operate like a voluntary purchase by the plaintiffs of the wife.—*Ibid.*

11. If the plaintiffs' in bringing this action, had proceeded upon the ground of declaring the sale and special contract void, under a provision authorizing this in case of default in any of the condi-

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tions therein stipulated to be performed, they could not recover, because they had not taken the necessary steps to rescind and place the defendant in *statu quo*.—*Ibid.*

12. The plaintiffs are not entitled to recover the full value of the organ, nor beyond the balance due on the contract, which represented their entire interest in the property at the time of the conversion; and the provision in the contract authorizing them to retain payments made, as damages for non-performance, would not affect the extent of the recovery in this case, for that provision is attached to, and is a part of, and applies only to the clause providing for declaring the contract void and retaking the property upon that ground.—*Ibid.*

13. Such a provision is not one that could be enforced as for stipulated damages, as it is not based upon any idea of just and adequate compensation.—*Ibid.*

14. The owner of chattels tortiously taken is entitled in trover to full compensation in damages, and no mere act of the wrong-doer can discharge him from liability. A subsequent sale on legal process against the owner and in favor of the trespasser, cannot be shown to reduce damages; and an appropriation under a mere power conferred by the owner, like that contained in the lease in this case, could certainly have no greater force than such a sale.—*Dalton v. Laudahn*, *529*.

See DAMAGES, 1: FRAUDULENT SALES, 2: LANDLORD AND TENANT, 4: REMEDY, 2.

TRUSTEE.

See CHATTEL MORTGAGES, 3.

UNDUE INFLUENCE.

See WILLS, 6.

UNSAFE PLACES.

See STREET RAILWAYS, 1–5.

USE OF PREMISES.

See ACCOUNTING.

USER.

See HIGHWAYS, 1–3.

UTTERING.

See FORGERY, 3.

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VACANCIES.

See OFFICE, 2.

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See PLAN OF DETROIT, 1–5.

VALUATION.

See INSURANCE, 2–8.

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See DAMAGES, 1: EVIDENCE, 6, 11.

VARIÀNCE.

See DECLARATION, 1: MALICIOUS PROSECUTION, 3.

VEHICLES.

See STREET RAILWAYS, 1.

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See TAXES, 1, 2.

VERACITY.

See EVIDENCE, 5.

VERDICT.

See PRACTICE IN CIRCUIT COURTS, 11: QUO WARRANTO, 1–5.

VESTED RIGHTS.

See BILL IN EQUITY, 3: PROHIBITORY LIQUOR LAW, 4.

VOLUNTARY PAYMENT.

Payment under legal process cannot be held voluntary; and therefore is no waiver of a right to pursue the party who should have liquidated the debt and saved the necessity of such payment.—*McKee v. Campbell*, 497.

See DECLARATION, 9.

VOTES.

See OFFICE, 1–9.

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VOYAGE.

See WATER-CRAFT ACT, 1.

WAIVER.

See ATTACHMENT, 3: FIXTURES, 2: JURISDICTION, 3: VOLUNTARY PAYMENT.

WANT OF PROSECUTION.

See PRACTICE IN CIRCUIT COURTS, 6-8: REMEDY, 1.

WARD.

See GUARDIAN AND WARD.

WARRANT.

See CRIMINAL PROCEEDINGS, 4.

WARRANTY.

See INSURANCE, 1-8.

WATER-CRAFT ACT.

1. The statute (*Comp. L. 1871, ch. 210*) providing for the collection of demands against water-craft was intended to give a remedy in all cases coming within its provisions in other particulars, where the vessel at the time was navigating the waters of the state, and where no remedy could be had in admiralty, and is not confined to water-craft used or intended to be used exclusively in navigating the waters of this state; and the fact that the vessel was upon a voyage from a port outside the state would be of no importance, except as it bore upon the question of admiralty jurisdiction.—*Brig "City of Erie" v. Canfield, 479.*
2. The fact that a boom in the Manistee river embraced a portion of the navigable waters capable of being navigated by large vessels does not necessarily constitute it a nuisance which may be abated by force; in any rules laid down for the public use of such a stream, the necessity and convenience of the floatage of logs, and the need of booming facilities to render that floatage of value, must be considered.—*Ibid.*
3. Upon the question whether the boom in this case was an unnecessary impediment to navigation, the circuit judge having examined the question elaborately, and reached the conclusion that it was not, and the evidence on which he acted not being returned, and the question being a complicated one, depending upon the particular facts, and the necessities and conveniences of the

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respective interests, which the circuit judge was in a position to consider and compare, and which this court is not, his conclusion is adopted as correct.—*Ibid.*

4. The boom in this case being a structure pertaining to the adjacent land, as much as a wharf or building erected thereon, and assuming that it extended no farther out than the land owner, with due regard to navigation, might properly extend it, wrongful injury to it would not be a marine injury, and could not be redressed in a court of admiralty.—*Ibid.*

WATER POWER.

See BILL IN EQUITY, 1–6.

WAYNE CIRCUIT.

See PRACTICE IN CIRCUIT COURTS, 12.

WHARVES.

See MECHANIC'S LIENS, 2.

WIFE.

See HOMESTEAD, 1–4.

WILLS.

1. In a will case where the will is contested on the ground of want of capacity, evidence of bad reputation of the person named as executor is competent when accompanied with a showing of circumstances sufficient to justify an inference that the testator knew at the date of the will that his character was bad.—*McGinnis v. Kempsey, 363.*

2. It is competent for contestants of a will to inquire as to the capacity of the testator at the time, to plan and execute such a paper as the will proposed.—*Kempsey v. McGinnis, 21 Mich., 123,* approved.—*Ibid.*

3. The propriety of a question is not necessarily to be settled by considering it as a substantive and independent inquiry, but the preceding course of examination and the surrounding circumstances will be taken into account; and where, during a long and minute examination and cross-examination, the opinion of a medical expert as to the capacity of the alleged testator has been elicited upon groups of assumed facts, by carefully framed hypothetical questions, without each time repeating the facts assumed, a question on re-examination which did not include the hypothesis, is treated and considered as resting upon the hypothesis pointed at by the cross-examination.—*Ibid.*

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4. Where the person who drew the proposed will has testified as a witness for proponents, that on an occasion about a year before he drew the will he made a memorandum of a land trade between the testator and another, and that on the day of executing the will the testator called his attention to it, the exclusion of an inquiry by proponents as to what recollection he had upon the subject himself is not error; the question was immaterial; the recollection of the testator, and not of the witness, was the only thing of importance connected with the circumstance.—*Ibid.*
5. It is not error to decline to charge that, "If the jury should find that upon *the other testimony* relating to the testator's mental soundness, the evidence was balanced, they should allow the legal presumption of sanity to decide the question in the testator's favor;" the burden of proof is on the proponents of a will, to establish capacity by other evidence than the presumption of sanity, and that presumption cannot have the force of an independent fact to serve as a substantial make-weight against counter proof.—*Ibid.*
6. Upon the subject of testamentary capacity and the intent and free action essential to the validity of a will, *Kempsey v. McGinnis, 21 Mich., 123*, is cited and approved.—*Ibid.*
7. Whether it is necessary to the validity of a will executed in this state, that the testator should declare it to be his last will:—*Quære?*—*Ibid.*

WITNESSES.

The latitude to be allowed in collateral inquiries as to difficulties between a witness and one of the parties, is a question resting somewhat upon the discretion of the trial court; and a court of review will not reverse a judgment for the exclusion of such inquiries, unless a clear abuse of discretion is made to appear.—*McGinnis v. Kempsey, 363.*

See CHARGE TO THE JURY, 7: EVIDENCE, 5: SEDUCTION, 3-6.

WRIT.

See DECLARATION, 1: OFFICER.

WRIT OF ERROR.

See HABEAS CORPUS: REMEDY.

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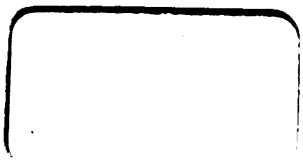

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